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No. 95-995

Supreme Court, U.S.
FILED
DEC 21 1995
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MURPHEY FAVRE, INC.,
WASHINGTON MUTUAL SAVINGS BANK,
GREGORY ONDRAK, JAMES ROYAN and
DOUGLAS SPRINGER,

Petitioners,

v.

PAUL M. LYNN, on behalf of himself and all similarly situated persons, and THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MISSOULA, THE HONORABLE JOHN S. HENSON, PRESIDING JUDGE,

Respondents.

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SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR A WRIT OF CERTIORARI

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25 pp

I. QUESTIONS PRESENTED FOR REVIEW

1. Does the Full Faith and Credit Clause of the United States Constitution prohibit certification of a class in a state court lawsuit ("Action 2") when a final judgment dismissing with prejudice the claims of the absent class members in Action 2 has been entered in another class action ("Action 1") pending in the court of another state?

2. Must the court in Action 2 give Full Faith and Credit to a finding by the court in Action 1 that it had personal jurisdiction over all members of the class, including the absent members of the putative class in Action 2, when the proposed class representative in Action 2 expressly contested, and lost, the jurisdiction issue in proceedings before the court in Action 1?

II. PARTIES

Murphey Favre, Inc.; Gregory Ondrak; James Royan; and Douglas Springer were relators below and are petitioners here. Washington Mutual Savings Bank filed a joinder as a relator below and is a petitioner here.[1]

The District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula, the Honorable John S. Henson, Presiding Judge, and Paul M. Lynn, seeking to act on behalf of himself and all similarly situated persons, were respondents below and are the respondents here.

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[1] Pursuant to Supreme Court Rule 29.1, Petitioners disclose the following information. WM Financial, Inc. is the parent corporation of Petitioner Murphey Favre, Inc. Washington Mutual Inc. is the parent corporation of Petitioner Washington Mutual Savings Bank. Neither of the Petitioner corporations has any nonwholly-owned subsidiaries.

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Petitioners,

v.

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all similarly situated persons, and THE DISTRICT
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COUNTY OF MISSOULA, THE HONORABLE
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ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR A WRIT OF CERTIORARI

Murphey Favre, Inc., Washington Mutual Savings Bank, Gregory Ondrak, James Royan and Douglas Springer respectfully petition for a writ of certiorari to review the judgment of the Supreme Court for the State of Montana

dismissing Petitioners' application for a Writ of Supervisory Control and thereby allowing the underlying action to proceed as a class action.

V. OPINIONS BELOW

Petitioners seek a Writ of Certiorari for review of the Montana Supreme Court's order dated September 26, 1995 (the "Dismissal Order"), which terminated original proceedings before that court in *Montana ex rel. Murphey Favre, Inc. v. District Court of Fourth Judicial Dist.*, No. 95-381 (the "Montana Writ Proceedings"). In dismissing the Montana Writ Proceedings, the Montana Supreme Court declined Petitioners' request for interlocutory and de novo review of an Opinion and Order (the "Certification Order") issued on July 27, 1995, by the trial court in proceedings captioned *Lynn v. Murphey Favre, Inc.*, No. 93-2-06519-2 (Mont. 4th Jud. Dist., Missoula County) (the "Montana Action"). The Certification Order certified a class in the Montana Action with respondent Paul M. Lynn as the sole class representative. The Certification Order was entered despite the entry on December 15, 1994, by a Washington State Court of a Final Judgment and Order of Dismissal With Prejudice (the "Final Judgment") and an Order Denying Montana Plaintiff's [Mr. Lynn's] Motion To Dismiss for Lack of Jurisdiction Over Montana Investors (the "Jurisdiction Order") in *Wright v. Murphey Favre, Inc.*, No. 93-2-06519-1 (Wash. Super. Ct., King County) (the "Washington Action"). None of these orders were published; copies are included in the Appendix.[2]

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[2]The Dismissal Order is at Appendix 1a-2a. The Certification Order is at Appendix 3a-10a. The Final Judgment is at Appendix 11a-18a. The Jurisdiction Order is at Appendix 19a-27a.

VI. JURISDICTIONAL STATEMENT

The Montana Supreme Court's Dismissal Order, entered on September 26, 1995, constitutes a final judgment terminating the Montana Writ Proceedings. *Fisher v. District Court of 16th Judicial Dist.*, 424 U.S. 382 (1976). Accordingly, this Court has jurisdiction over this Petition. *See* 28 U.S.C. §1257(a).

VII. RELEVANT CONSTITUTIONAL PROVISION

The constitutional provision pertinent to this Petition is United States Constitution, Article IV, Section 1:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.

VIII. STATEMENT OF THE CASE

A. Overview of the Case.

This Petition arises from the failure of the Montana state courts to afford Full Faith and Credit to a final judgment rendered by a court of the state of Washington. The Final Judgment in the Washington Action approved a class action settlement and authorized distribution of a $12 million settlement fund in return for the defendants' receiving complete releases and full and final peace from the claims of the settlement class. Despite the Final Judgment, the Montana trial court subsequently certified a class in the Montana Action consisting largely of persons who had already released their claims and received settlement distributions in the Washington Action.

In adopting the Certification Order, the Montana trial court necessarily determined that the Washington court

had improperly exercised personal jurisdiction over the Montana members of the Washington settlement class. Appendix 6a-7a. Respondent Lynn—the sole proposed Montana class representative—had already litigated and lost that issue before the Washington court. Appendix 23a-26a.

Petitioners seek relief from the Montana courts' orders because they violate the Full Faith and Credit Clause of the United States Constitution and fundamentally disregard the strong public policy favoring finality and enforcement of negotiated class action settlements. Petitioners request that this Court accept review of the Dismissal Order and direct the Montana Supreme Court to enter an order prohibiting the Montana Action from being maintained as a class action. Entry of the requested order *now* is necessary so that Petitioners will not be forced to face the time, significant expense and uncertainty of having to litigate again class action claims from which they have already been released.

The relevant proceedings in the Washington Action, the Montana Action and the Montana Writ Proceedings are described in more detail below.[3]

B. Parallel Securities Class Actions Were Filed in Washington and Montana.

The Washington Action was a class action asserting claims for violations of state securities and consumer protection statutes and common law on behalf of *all*

[3] For the Court's reference, a consolidated chronology of the pertinent motions, filings and orders in the Washington Action, the Montana Action and the Montana Writ Proceedings from May 1994 through September 1995 is set forth at Appendix 173a-177a.

individuals (regardless of their state of residence) who purchased certain securities ("Homestead Bonds") from petitioner Murphey Favre. The Washington Action was filed and served on the defendants in March 1993.[4]

The Montana Action is a class action that also asserts claims under state securities and consumer protection statutes and common law based on purchases of Homestead Bonds. The Montana Action was initiated in February 1993, but was not served on Petitioners until July 1993. The class in the Montana Action is a subset of the class in the Washington Action—specifically, Montana residents who purchased Homestead Bonds from Murphey Favre and persons who purchased Homestead Bonds through Murphey Favre's office in Montana. Appendix 133a.

C. The Washington Settlement Extinguished All Class Members' Claims.

1. A Class-Wide Settlement Was Reached in the Washington Action.

In May 1994, the parties in the Washington Action reached a class-wide settlement. Under that settlement, the defendants created a $12 million settlement fund in return for releases from and dismissal with prejudice of the claims of all class members who did not request exclusion from the class. Appendix 153a-154a. Both the Stipulation of Settlement and the Final Judgment

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[4] Plaintiffs in the Washington Action eventually filed three versions of their Complaint. In each version, the class was defined as "all purchasers" of Homestead Bonds. *See* Appendix 157a-172a (excerpts). The Stipulation of Settlement entered by the parties incorporated this definition. Appendix 152a-153a. This definition was then carried forward into the Final Judgment. Appendix 11a.

carried forward the broad scope of the class definition previously alleged in the complaints in the Washington Action by defining the "Class" to mean:

> [P]laintiffs and all Persons who purchased Homestead Bonds from Murphey Favre at any time during The Class Period or such Persons who, as of the end of The Claim Period . . . hold the causes of action alleged in the Second Amended Complaint, but excludes any Person who has previously settled with and released any of the Defendants from claims arising out of or relating to the purchase of Homestead Bonds from or through Murphey Favre.

Appendix 11a, 152a-153a.

Notice of the settlement and a Proof of Claim and Release form were mailed directly to the class members. Appendix 182a-195a. Notice was also published in national and regional publications, including the Missolula, Montana newspaper. Appendix 12a. In both the class notice and the Proof of Claim form, class members were advised of the opportunity to request exclusion from the class. Appendix 12a-13a, 183a. The only persons who opted out of the Washington settlement class, however, were the named plaintiffs in the Montana Action. Appendix 15a, 18a. Every other person or entity in the settlement class in the Washington Action was deemed to have given full releases to the defendants, including Petitioners. Appendix 15a.

The Washington court preliminarily approved the settlement in August 1994 and entered the Final Judgment on December 15, 1994. Appendix 11a-12a, 17a.

2. Respondent Lynn Raised Personal Jurisdiction Objections Before the Washington Court.

On November 28, 1994, respondent Lynn filed a motion in the Washington court to dismiss the claims of *all* class members who either resided in or made their Homestead Bond purchases in Montana (the "Jurisdiction Motion"). Appendix 23a. Mr. Lynn contended that the Washington court lacked personal jurisdiction over Montana bond purchasers. Appendix 21a-22a.

After receiving affidavits, exhibits and legal memoranda from the interested parties, the Washington court heard oral argument on the Jurisdiction Motion on December 2, 1994. At the end of the hearing, the Washington court denied the Jurisdiction Motion. The Washington court determined that it had personal jurisdiction over the Montana bond purchasers because the notice and opt-out procedures used in the Washington Action satisfied the standards set forth in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Appendix 25a-26a.

On December 15, 1994, the Washington court entered the Jurisdiction Order memorializing its earlier denial of Mr. Lynn's Jurisdiction Motion. The Jurisdiction Order reiterated that the question of the Washington court's personal jurisdiction over the Montana bond purchasers had been fully and fairly litigated:

> Counsel for Mr. Lynn and their clients have had a full and fair opportunity to raise their objections to (a) the form of the Class Notice, (b) the adequacy of the class representatives in this case with respect to Montana purchasers of Homestead Bonds and (c) this Court's personal jurisdiction over the absent class members. Counsel for Mr. Lynn and their clients have submitted the Jurisdiction Motion

> . . . and Mr. Youtz appeared and argued in hearings before this Court on November 17, 1994 and December 2, 1994.

Appendix 24a. After full consideration of the issues, the Washington court rejected Mr. Lynn's jurisdiction objections:

> 2. *Jurisdiction.* However, because Counsel for Mr. Lynn have raised questions concerning this Court's jurisdiction, the Court has considered the merits of the Jurisdiction Motion. The Court rules that it has personal jurisdiction over the absent class members in this case, including the Montana purchasers of Homestead Bonds.

Appendix 25a. Mr. Lynn did not seek appellate review of the Jurisdiction Order.[5]

3. The Washington Court Entered a Final Judgment Dismissing the Class Members' Claims.

The Washington court also entered its Final Judgment approving the class-wide settlement on December 15, 1994. Consistent with the court's ruling in the Jurisdiction Order, the Final Judgment set forth findings supporting its personal jurisdiction over the class members:

> The Notice and the Summary Notice constitute the best notice practicable under the circumstances and provided individual notice to all Class Members who could be identified by reasonable effort. The Notice

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[5] The Washington court also determined that Mr. Lynn lacked standing to raise the objections because (a) he had requested exclusion and was therefore not a class member and (b) he had presented no evidence of any authority to request exclusion from the Washington class on behalf of any Montana class members. Appendix 25a.

> properly informed persons in the Class of their rights under the Settlement, including, without limitation, their right to opt out and pursue individual actions, and the consequences of failing to opt out. . . . [T]he best notice practicable under the circumstances was in fact given and constituted valid, due, and sufficient notice to members of the Class, complying fully with due process and Rule 23 of the Superior Court Civil Rules.

Appendix 12a-13a.[6]

Having determined its personal jurisdiction and having determined that the settlement was fair, reasonable and adequate, the Washington court entered the Final Judgment. The Final Judgment dismissed the class members' claims with prejudice and granted the defendants (including Petitioners) full releases and repose from those claims. Appendix 14a-15a. Neither Mr. Lynn nor any class member appealed either the Jurisdiction Order or the Final Judgment.

Excluding the named plaintiffs in the Montana Action (who opted out) and persons who had previously settled with Petitioners in other actions, the Washington settlement class included Montana bond purchasers holding 123 accounts in which they purchased Homestead Bonds. Appendix 178a-181a. Montana Bond purchasers actually filed claims for 112 of those accounts in the Washington settlement, leaving only 11 accounts in which no response was made. Thus, more than 91 percent of the eligible accounts filed claims in the Washington Action.[7] *Id.*

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[6] Washington Civil Rule 23 is identical to Fed. R. Civ. P. 23.

[7] Some of the Montana bond purchasers bought Homestead Bonds in more than one account and many of the accounts were jointly held. Thus, the number of *accounts* participating in the

[footnote continued]

Each Montana bond purchaser filing a claim in the Washington settlement *expressly* submitted to the Washington court's jurisdiction:

> I submit this Proof of Claim and Release under the terms of the Stipulation of Settlement described in the Notice. I also submit to the jurisdiction of the Superior Court of the State of Washington for King County (the "Court") with respect to my claim as a Class Member and for purposes of enforcing the release set forth herein.

Appendix 189a.

In addition, each of the Montana bond purchasers who filed claims in the Washington settlement expressly released the defendants (including Petitioners) from the claims being asserted in the Montana Action:

> I acknowledge full and complete satisfaction of all Released Claims as that term is defined in the Notice and the Stipulation and do fully, finally and forever release and discharge . . . the [Released Parties] from all Released Claims . . . that have been, could have been, or in the future could be asserted . . . based upon the facts, transactions, events, occurrences, acts, misrepresentations or omissions arising out of, or in any way related to the purchase of Homestead Bonds . . . .

Appendix 189a-190a.

The releases and dismissal with prejudice of claims were binding upon *all* members of the Washington settlement class, whether or not they filed claims. Appendix 14a-15a. Thus, the defendants entered into the Washing-

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Washington settlement is the easiest measure of the level of participation. More than $752,000 has been paid to the holders of those accounts.

ton settlement with the expectation that all claims regarding Homestead Bonds would be extinguished except those asserted by the *named* plaintiffs in the Montana Action.

D. The Montana Courts Improperly Disregarded the Washington Court's Final Judgment.

1. Mr. Lynn Requested Class Certification in the Montana Action.

Despite litigating and losing the personal jurisdiction issues before the Washington court, respondent Lynn asked the Montana court to certify a class of Montana bond purchasers in the Montana Action. Mr. Lynn designated himself as the sole class representative. Appendix 133a. Mr. Lynn filed his class certification motion in the Montana Action on December 15, 1994, *after* his Jurisdiction Motion had been *denied* by the Washington court and on the very same day the Washington court issued the written Jurisdiction Order and the Final Judgment. Appendix 174a-175a.

In direct disregard of the Washington court's rulings, Mr. Lynn defined his proposed class to include the Montana bond purchasers whose claims had been extinguished by the Final Judgment and the releases. Appendix 133a.

2. The Montana Court Certified a Class Despite the Final Judgment.

Petitioners objected to class certification in the Montana Action based on their rights under the Full Faith and Credit Clause. *See, e.g.,* Appendix 64a-67a, 101a. Petitioners placed into evidence before the Montana court the Final Judgment, the Jurisdiction Order and the briefing and evidence filed by Mr. Lynn in the Washing-

ton Action to demonstrate that Mr. Lynn was raising before the Montana court *precisely* the same jurisdictional arguments he had raised in the Washington Action. Appendix 65a-66a.[8]

The Montana trial court rejected Petitioners' arguments and certified Mr. Lynn's proposed class in the Montana Action. Appendix 7a-10a. The Certification Order recognized that the Washington court had decided the jurisdictional issue. Appendix 6a-7a. The Montana court disregarded the Final Judgment's jurisdictional findings, however, because it apparently disagreed with the Washington court's conclusion:

> The Washington Court *determined that the class notice in that action was sufficient*, and did not require comparisons of class member rights under different state laws. While the court agrees with this precept, it continues to find it problematic that many Montana purchasers apparently were never made aware at all of a parallel Montana action. . . . This Court has attempted to ensure that the Montana purchasers be apprised of the Montana action, thereby allowing them a choice. They have not been so notified, through no fault of Plaintiffs' counsel, *and this in itself may be sufficient to invalidate the Washington court's exercise of jurisdiction over the Montana bond purchasers.*

Id. (emphasis added).

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[8] On December 5, 1994, the Montana court entered an Order Allowing Communication With Montana Bond Purchasers. Appendix 135a-137a. Petitioners' motion to vacate that order (which authorized the notification of Montana purchasers that the Montana Action was pending before the certification of a class) was denied in the Certification Order.

3. The Montana Supreme Court Declined to Review the Certification Order.

Petitioners sought interlocutory and de novo review of the Certification Order by commencing the Montana Writ Proceedings before the Montana Supreme Court. Appendix 28a-42a. In their Application for Writ of Supervisory Control, Petitioners again raised the Full Faith and Credit issues by placing them squarely before the Montana Supreme Court:

> Is the Washington Court's Final Judgment, entered after full briefing and oral argument in Washington by both sides in the present action, which dismissed the claims of all members of the Homestead Class who did not properly opt out of the Washington action, including those residing in Montana, entitled to Full Faith and Credit by the courts of the State of Montana?

Appendix 31a.

Without reaching the merits of the issues, the Montana Supreme Court dismissed the Montana Writ Proceedings, leaving the issue for resolution on appeal only after disposition of the entire case below. Appendix 1a-2a. These proceedings were timely commenced following entry of the Dismissal Order.

IX. REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts With Applicable Precedent and Undermines Important Public Policies.

In this case, the Montana courts erred by failing to give preclusive effect to the resolution of claims and jurisdictional issues embodied in a final judgment entered in the court of a sister state. In disregarding the Washington

court's Final Judgment, the Montana courts violated the Full Faith and Credit Clause of the United States Constitution. This constitutional provision is "central to our system of jurisprudence" because it eliminates the "uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue." *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident Health Ins. Guar. Ass'n*, 455 U.S. 691, 703-04 (1982).

In a longstanding series of cases, this Court has established "the general rule that a judgment is entitled to full faith and credit—even as to issues of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." *Durfee v. Duke*, 375 U.S. 106, 111 (1963). Because the litigation that produced the Washington court's Final Judgment fully and fairly disposed of the claims of all the absent class members in the Washington settlement class, certification of a class asserting those claims in the Montana Action was clear error.

In certifying the class in the Montana Action, the Montana court apparently revisited the question of whether the Washington court had personal jurisdiction over Montana bond purchasers. This inquiry was also improper, because respondent Lynn actually litigated (and lost) before the *Washington* court his objection to the Washington court's exercise of personal jurisdiction over the Montana bond purchasers. Under *Durfee*, the "permissible scope" of the Montana court's inquiry was limited to whether the jurisdiction issues were actually litigated and finally decided in Washington. *Id.* With the uncontroverted record demonstrating the Washington court's full consideration of the jurisdictional issues, the Montana court was required to give Full Faith and Credit to the

Washington court's jurisdictional ruling when Mr. Lynn applied for class certification in the Montana Action.

The Montana courts' failure to afford Full Faith and Credit to the Final Judgment runs counter to at least three fundamental public policies with significant consequences to civil litigants.

First, the decision violates the policy described in *Durfee* and other cases as the doctrine of "jurisdictional finality." *Durfee*, 375 U.S. at 113. This doctrine ensures that once the question of a court's jurisdiction has been finally decided, it will not be litigated again with the concomitant waste of judicial and private resources. *See Underwriters Nat'l Assurance Co.*, 455 U.S. at 703-04.

Second, the decision undercuts the public policy favoring negotiated resolutions of disputes. This policy, like jurisdictional finality, is strongly favored because it conserves the resources of the courts and the parties.

Third, the decision calls into question the efficacy of settlements in multistate state court class actions. Enforcement of class action settlements is "strongly favored because class actions are uncertain and costly. A defendant without assurance of [the settlement's] binding effect [is] likely to be subjected to a 'heads I win, tails you lose' approach." Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum v. Shutts, 96 Yale L.J. 1, 36 (1986). This patently improper result is precisely the situation confronting Petitioners, who now face renewed litigation with a class of plaintiffs whose claims were dismissed and released in the Washington settlement.

This Court has recently acknowledged the importance of questions regarding the scope of class action settle-

ments. *See Matsushita Elec. Indus. Co. v. Epstein*, 115 S. Ct. 2576 (U.S. 1995) (granting *certiorari* on Full Faith and Credit issues arising from a state court class action settlement). This case presents the Full Faith and Credit issues in the context of the exact evil sought to be avoided by the drafters of the Constitution—inconsistent results arising from relitigating an issue previously decided by a state court.[9]

For all these reasons, this Court should review and reverse the Dismissal Order and direct that the Montana Action cannot be maintained as a class action.

B. The Montana Courts' Decisions Directly Conflict With Applicable Precedent Concerning the Preclusive Effect of Contested Jurisdictional Rulings.

On its face, the Final Judgment dismisses and bars further prosecution of the claims of all class members *except* those persons who properly requested exclusion from the Washington class. Appendix 14a-15a. Absent a jurisdictional defect, the Full Faith and Credit Clause dictates that the Final Judgment must be afforded preclusive effect and bar the class members' claims. Thus, the sole possible justification for the Montana courts' permitting class action proceedings in the Montana Action is a finding that the Washington court lacked jurisdiction over the Montana bond purchasers. As is

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[9] In *Epstein*, this Court granted certiorari on the question: "Whether a federal court can withhold full faith and credit from a state court final judgment approving a class action settlement simply because the settlement released federal claims." *See Epstein*, 115 S. Ct. at 2576 (granting petition on question No. 1 stated in the certiorari petition).

demonstrated below, however, the Montana court was precluded from making that determination on Mr. Lynn's motion because the Washington court's rejection of Mr. Lynn's contentions is also entitled to Full Faith and Credit.

1. Full Faith and Credit Must Be Afforded to Jurisdictional Rulings When Jurisdiction Is Contested Before the Court Issuing the Judgment.

A final decision by a state court concerning its jurisdiction is binding on a party that litigates the issue before that court. Having litigated jurisdictional issues once, the parties are not entitled to seek a different result in the courts of another state, because the issuing court's jurisdictional ruling is entitled to Full Faith and Credit under the United States Constitution. *See, e.g., Durfee*, 375 U.S. at 111.

In *Durfee*, Justice Stewart, writing for a unanimous court, found that prior precedent "unambiguously" established the applicability of Full Faith and Credit to a court's findings concerning its own *personal* jurisdiction:

> We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.

375 U.S. at 111-12 (quoting *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525-26 (1931)). Because jurisdiction had been finally decided once, further litigation of that question was prohibited by the Full Faith and Credit Clause. *Id.*

The doctrine of jurisdictional finality should likewise preclude Mr. Lynn from collaterally attacking the Washington court's jurisdiction over the Montana bond purchasers. *See Underwriters Nat'l Assurance Co.*, 455 U.S. at 706-07 (party who appears before the court in a class action cannot later collaterally attack jurisdiction when the issue was litigated in the class proceedings). Mr. Lynn was barred from questioning the Washington court's jurisdiction to dismiss the claims of the Montana bond purchasers because those issues were resolved by the Washington court. Appendix 25a-26a. Upon completion of an inquiry into whether the jurisdiction issues were litigated in Washington, the Montana court was obligated to defer to the Washington court's ruling and to deny Mr. Lynn's class certification motion. *Durfee*, 375 U.S. at 111-12.[10]

2. Mr. Lynn Fully and Fairly Litigated the Issue of Personal Jurisdiction Before the Washington Court.

Respondent Lynn unquestionably raised and litigated before the Washington court the question of the Washington court's personal jurisdiction over the Montana bond purchasers. As recited in the Jurisdiction Order, the

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[10]The Montana court's finding that the Washington court lacked personal jurisdiction was improper for an additional reason. Each person or entity filing a claim specifically and expressly submitted themselves to personal jurisdiction before the Washington court by signing the Proof of Claim and Release. *See* Appendix 189a-190a. Thus, in addition to the consent which the *Shutts* decision implies from the failure to request exclusion from the class, those persons filing claims *actually* consented to jurisdiction in Washington. Of the 123 Montana accounts which were part of the Washington Class, only 11 did not expressly consent to the Washington court's personal jurisdiction. Appendix 178a-181a.

issue "came before the Court on the Motion to Dismiss for Lack of Jurisdiction Over Montana Investors . . . filed by . . . counsel for Mr. Paul Lynn." Appendix 20a. Respondent Lynn and the parties to the Washington Action filed testimony, exhibits and legal memoranda and presented oral arguments to the Washington court. Appendix 20a-21a. Appropriately, the jurisdictional dispute centered around whether the notice and opt-out procedures used in the Washington Action were sufficient to satisfy the due process standards specified by this Court. *See Shutts*, 472 U.S. at 811-12.

In *Shutts*, this Court held that to bind absent class members in a settlement, four conditions must be satisfied: (1) the absent class members must receive adequate notice of their rights (here, their rights under the Stipulation of Settlement) and an opportunity to be heard, (2) they must be given an opportunity to "opt out" of the class, (3) they must be adequately represented by the proposed class representatives, and (4) the forum state must have sufficient minimum contacts with the claims asserted on behalf of the class in order for the court to apply its substantive law to those claims. 472 U.S. at 811-12, 818-22. The Jurisdiction Order leaves no doubt that Mr. Lynn contested the question of whether the Washington court had personal jurisdiction over absent class members under *Shutts*:

> Counsel for Mr. Lynn . . . have had a full and fair opportunity to raise their objections to (a) the form of the Class Notice, (b) the adequacy of the Class representatives with respect to Montana purchasers of Homestead Bonds and (c) this Court's personal jurisdiction over the absent class members.

Appendix 24a. The Montana court's inquiry into the personal jurisdiction of the Washington court should

have begun and ended with this record. *Durfee*, 375 U.S. at 111-12 ("[A] judgment is entitled to full faith and credit . . . When *the second court's inquiry discloses* that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.") (emphasis added).[11]

Likewise, the Final Judgment clarified that the Washington court *rejected* Mr. Lynn's personal jurisdiction objections. The Washington court found constitutionally sufficient notice and the required opportunity to opt out had been afforded to the class. Appendix 12a-13a. The Washington court also ruled that all class members had been adequately represented. *Id.* Finally, the Washington court found the settlement fair and reasonable in light of the applicable law. *Id.* Thus, the Final Judgment established each element necessary for the Washington court to exercise personal jurisdiction over the absent class members under *Shutts*.

The record before the Montana court unequivocally demonstrated that the Washington court issued a decision, binding on Mr. Lynn, concerning its personal jurisdiction. Under *Durfee* and *Baldwin*, the debate over the Washington court's authority to dismiss the class members' claims should then have come to an end. The Montana trial court's independent evaluation of the jurisdiction question was error, as was the Montana Supreme Court's failure to rectify the lower court's mistake.

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[11] If the Montana court needed further proof that Mr. Lynn was replowing the ground he had covered in Washington, that evidence was provided in Petitioners' briefing on the Full Faith and Credit issue. That briefing demonstrated Mr. Lynn had raised exactly the same arguments in Washington and Montana on the jurisdiction question. *See* Appendix 65a.

Notwithstanding the undisputed evidence that Mr. Lynn had litigated and lost the *exact same* jurisdictional objections, the Montana courts certified (and let stand the certification of) the Montana class because they disagreed with the conclusions reached by the Washington court. *See* Appendix 7a ("[T]his in itself may be sufficient to invalidate the Washington court's exercise of jurisdiction . . . .").

However, as this Court established in *Durfee*, a court cannot overturn the jurisdictional findings of a foreign court merely because it disagrees with the foreign court's rulings. Once Mr. Lynn chose not to appeal the Jurisdiction Order and the Final Judgment, he was bound by them. He was not free to litigate the jurisdiction issues over again in Montana, with the hope that a more favorable ruling would be obtained there. The Montana courts placed their imprimatur on Mr. Lynn's tactics by certifying and confirming a Montana "class." This Court should not allow those decisions to stand.

C. Supreme Court Review Is the Only Meaningful Method of Effecting the Policies Underlying the Full Faith and Credit Clause.

1. Public Policy Favors Final Resolutions and an End to Litigated Matters.

As explained in *Durfee*, the Full Faith and Credit Clause embodies the national public policy in favor of preventing repeated, unnecessary and expensive litigation of matters that have been finally decided between the parties. As this Court has stated:

> Public policy dictates that there be an end of litigation; that those who have contested an issue

> shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.

Baldwin, 283 U.S. at 525-26. Stated another way, "[o]ne trial of an issue is enough." *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78 (1939).

Indeed, the policy favoring finality is so strong that courts have uniformly accorded Full Faith and Credit to settlements which extinguish claims arising from the same factual situation that were not even asserted in the underlying complaint. *See Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 32-33 (1st Cir. 1991) (court-approved state court class action settlement bars class members' claims through issue preclusion and by reason of the release language in the judgment; Full Faith and Credit must be afforded to both). In *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982), the Second Circuit expressly held that:

> [I]n order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim *based on the identical factual predicate* as that underlying the claims in the settled class action *even though the claim was not presented and might not have been presentable in the class action.*

(Emphasis added); *see also National Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9, 18 n.7 (2d Cir. 1981); *Epstein v. MCA, Inc.*, 50 F.3d 644, 663 (9th Cir.) (courts have authority to release claims arising from factual predicate underlying a class action, even if the claims were not set forth in the complaint), *cert. granted,*

in part sub nom. Matsushita Elec. Indus. Co. v. Epstein, 115 S. Ct. 2576 (U.S. 1995).[12]

This constitutionally-based public policy is intended to prevent precisely the kind of forum shopping undertaken by respondent Lynn when he moved to certify a class in the Montana Action. In the words of the old saw, Mr. Lynn is entitled to only one bite at the jurisdictional apple. Having litigated and lost the jurisdiction questions before the Washington court, Mr. Lynn is precluded by the *Durfee/Baldwin* policy of jurisdictional finality from litigating those questions again. To permit repeated litigation of those questions would unnecessarily burden the courts and the parties to the dispute.

2. The Montana Courts' Orders Undermine the Public Policy in Favor of Negotiated Settlements.

Under the laws of the United States, as well as the laws of Montana and Washington, fundamental public policy favors resolving litigation through negotiated settlements. *See Air Line Stewards v. Trans World Airlines*, 630 F.2d 1164, 1166-67 (7th Cir. 1980), *aff'd sub nom. Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) ("Federal courts look with great favor upon the voluntary

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[12] Unlike *Epstein*, there is no dispute here that the claims in the Washington Action and the Montana Action arise from the same factual predicate. In addition, no federal claims were asserted or available to plaintiffs in the Washington Action or the Montana Action because both cases were brought more than three years after the class members purchased the securities at issue. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360 (1991) (absolute three-year cutoff for claims arising under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) and SEC Rule 10b-5, 17 C.F.R. §240.10b-5).

resolution of litigation through settlement. This rule has particular force regarding class action lawsuits.") (citations omitted); *State Highway Comm'n v. Arms*, 518 P.2d 35, 37 (Mont. 1974) ("Compromises are favored by the Court. This is such a universal rule as to require no citation of authority."); *Haller v. Wallis*, 573 P.2d 1302, 1305 (Wash. 1978) ("The law favors settlements, and consequently it must also favor their finality."). By entering into negotiated settlements, the parties achieve certainty as to their rights and obligations and avoid the monetary and other costs of continued litigation.

Mr. Lynn's attempt to avoid the consequences of the Final Judgment, if allowed to stand, will jeopardize Petitioners' realization of the specific benefits of the settlement negotiated, approved and implemented in the Washington Action. Petitioners entered into the settlement in the Washington Action for the express purpose of *ending* the litigation with the members of the class who did not request exclusion. Appendix 13a-14a. Not one of the persons whose claims were dismissed has questioned the fairness of the settlement or the Washington court's authority to effect it. Indeed, more than 91 percent of the accounts represented by the Montana class have accepted distributions from the Washington settlement after the account holders expressly submitted to the Washington court's jurisdiction. Appendix 178a-181a. Mr. Lynn, who is free to pursue his individual claims, should not now be allowed to disrupt the judicially-approved settlement that Petitioners have reached with the Washington settlement class.

3. Predictability and Finality Are Especially Critical in Class Action Proceedings.

Because of the unique nature of class action litigation, this Court has provided express guidance concerning the procedures that must be followed to exercise personal jurisdiction over absent class members in multistate class actions pending in state courts. *See Shutts*, 472 U.S. at 811-12. Defendants who enter into settlements and comply with the *Shutts* guidelines are entitled to protection of their "distinct and personal interest in seeing the entire plaintiff class bound by res judicata . . . ." *Shutts*, 472 U.S. at 805.

Petitioners were motivated to settle the Washington Action in substantial part because it would effect a release of the claims of all class members who did not opt out of the settlement. Defendants in securities class actions frequently settle them because of the extraordinary expense required to defend these cases and the significant legal exposure involved. *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 498-99 (1990) (class action settlements are often neither voluntary (because trial is not considered a practical alternative) nor accurate (because the merits have little impact upon the terms of the ultimate settlement)); Anthony Q. Fletcher, *Curing Crib Death: Emerging Growth Companies, Nuisance Suits, and Congressional Proposals for Securities Litigation Reform*, 32 Harv. J. on Legis. 493, 500-03 (1995) (meritless securities fraud class actions carry substantial settlement value because (1) they cost more to defend than to prosecute, (2) early

resolution through summary judgment is unlikely, and (3) they generate adverse publicity).[13]

In short, defendants often settle securities class actions for reasons *other* than the merits. In doing so, the defendants are seeking to avoid ongoing litigation costs and to obtain full, final and complete resolution of the class' claims.

Stringent enforcement of the constitutional requirement of Full Faith and Credit between the courts of different states is crucial to this goal. Through multistate class action settlements, the parties establish a uniform resolution, rather than one based on local views or biases. However, such settlements are *only* likely to occur when the settling defendants are certain that the settlement will bring an effective end to the costs and burdens of the litigation. *See Shutts*, 472 U.S. at 805. The interests of judicial efficiency would be impermissibly ignored were parties able to jump from state to state in a quest for what they deem the most favorable result.

By permitting the Montana Action to proceed as a class action, the Montana courts have severely undermined the basis for the settlement in the Washington Action. The Montana courts' rulings not only violate the

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[13] *See also* Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 Neb. L. Rev. 646, 686 (1994) (five factors drive parties to settle class actions that are entirely devoid of merit: (1) risk aversion, (2) high potential damages, (3) hourly based compensation of plaintiffs' lawyers, (4) agency problems, and (5) insurance and indemnification rules). Courts have joined commentators in acknowledging the substantial likelihood that securities class actions will result in settlement. *See In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) (recognizing "familiar axiom that a bad settlement is almost always better than a good trial").

Constitution, but also are effectively unappealable because Petitioners are once again subject to the factors—not based on merits—that led to the Washington settlement in the first place.

4. Resolution of Jurisdictional Issues Is Appropriate in Interlocutory Proceedings.

This Court has previously recognized the importance of promptly correcting errors concerning a lower court's jurisdictional rulings. *See Fisher v. District Court of 16th Judicial Dist.*, 424 U.S. 382, 385 (1976). The risk arising from inconsistent decisions on those issues presents a sufficiently important question to allow interlocutory review. *Id.* This case presents a situation of equal urgency. To preserve the sanctity of final judgments and to affirm the sovereignty of state courts, this Court should accept review of this critical issue at this stage of the proceedings.

This is particularly true because continued litigation under the class action cloud is not a difficulty that can be remedied appropriately on appeal. The class action context of the case will necessarily alter the dynamics, both in trial and in settlement negotiations. This Court should grant review now.

X. CONCLUSION

The Montana courts failed to give Full Faith and Credit to the Washington court's rulings in violation of the United States Constitution. This failure will, if not corrected, deprive Petitioners of the full benefit of the arm's-length class action settlement approved by the court in the Washington Action.

This Court should reverse the Montana Supreme Court's denial of a Writ of Supervisory Control and direct that court to enter an order prohibiting the Montana Action from proceeding with respect to claims on behalf of any person or entity that did not request exclusion from the settlement class in the Washington Action.

Respectfully submitted,

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December 21, 1995

(7) 95-995

No.

Supreme Court, U.S.
FILED
DEC 21 1995
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MURPHEY FAVRE, INC.,
WASHINGTON MUTUAL SAVINGS BANK,
GREGORY ONDRAK, JAMES ROYAN and
DOUGLAS SPRINGER,

Petitioners,

v.

PAUL M. LYNN, on behalf of himself and all similarly situated persons, and THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MISSOULA, THE HONORABLE JOHN S. HENSON, PRESIDING JUDGE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF MONTANA

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

[Filed SEP 26 1995]

IN THE
SUPREME COURT OF THE STATE OF MONTANA
No. 95-381

THE STATE OF MONTANA ON THE
RELATION OF MURPHEY FAVRE, INC., et al.,
Relators,

v.

THE DISTRICT COURT OF THE FOURTH
JUDICIAL DISTRICT OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF MISSOULA,
THE HONORABLE JOHN S. HENSON, Presiding
Judge, and PAUL M. LYNN, on behalf of himself
and all similarly situated persons, et al.,
Respondents.

ORDER

Relators, Murphey Favre, Inc., et al, have applied to this Court for a writ of supervisory control or other appropriate relief, pursuant to Rule 17, M.R. App. P. Relators ask that we vacate an order of the District Court of the Fourth Judicial District which directed that Montana investors affected by the class action be notified of their option to join the suit. Relators further ask that we direct the District Court to enter an order decertifying the Montana class action and dismissing, with prejudice, all claims of Montana purchasers who did not affirmatively opt out of the related Washington class action.

Under Rule 17, M.R. Civ. P., this Court is empowered to exercise the power of supervisory control when conditions make due consideration in the trial court and appeal to this Court an inadequate remedy, or when this Court deems supervision of a trial court other than by appeal necessary or proper.

Having considered this matter, the Court concludes that relators have not shown that their remedy by appeal is inadequate and that the circumstances justify the issuance of the extraordinary writ of supervisory control in this case.

Therefore,

IT IS ORDERED that the application for writ of supervisory control is DENIED.

The Clerk is directed to mail a true copy of this order to relators personally and to all other parties of record.

DATED this 26th day of September, 1995.

/s/ J.A. Turnage
Chief Justice
/s/ Terry Trieweiler
/s/ Karla M. Gray
/s/ William E. Hunt, Sr.
/s/ James C. Nelson
/s/ W. William Leaphart

APPENDIX B

[Filed JUL 27 1995]

John S. Henson, District Judge
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MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY

Cause No. 77454/134

PAUL M. LYNN, on behalf of
all similarly situated persons,

Class Plaintiff,

-vs-

MURPHEY FAVRE, INC. a corporation;
WASHINGTON MUTUAL SAVINGS BANK,
a corporation; DOUGLAS D. SPRINGER, an
individual; GREGORY J. ONDRAK, an
individual; JAMES W. ROYAN,
an individual; and DOES 1-100,

Defendants.

OPINION AND ORDER

The matters before the Court are Plaintiffs' motion for class certification, and Murphey Favre's motion to vacate the Court's Order allowing communication with Montana Bond Purchasers. In addition, it has been brought to

the Court's attention that Defendant Washington Mutual's motion to dismiss for lack of personal jurisdiction is still pending.

Motion to Dismiss of Lack of Personal Jurisdiction

a. *Waiver of Lack of Personal Jurisdiction.*

Plaintiffs maintain that Washington Mutual has waived its right to assert lack of personal jurisdiction, and should not be allowed to amend its motion to dismiss. Washington Mutual counters that the holding in *Heinle v. Fourth Judicial District Court*, (1993) 260 Mont. 489, 861 P.2d 171, applies. *Heinle* stated that waiver is immaterial where the controlling consideration is whether a Montana court has a constitutional basis to exercise personal jurisdiction. It would appear that the *Heinle* exception has, in most respects, swallowed the rule, that being Rule 12 (b)2, Mont.R.Civ.P. The Court concurs with Defendant that the analysis set forth in *Edsall Construction Co. v. Robinson*, (1991) 246 Mont. 378, 804 P.2d 1039, is the key consideration before the Court.

b. *Washington Mutual's Contacts with Montana.*

Washington Mutual contends that this Court's exercise of jurisdiction would be violative of Montana's long arm statute and due process as it is not found within the state. Specifically, Defendant contends that Washington Mutual has no officers or employees in Montana and has not engaged in transactions in Montana or solicited business here, save for indirect activities. Defendant states that ownership of Murphey Favre is insufficient to subject Washington Mutual to Montana jurisdiction; they are two separate and distinct corporate entities, and such a parent/subsidiary relationship is not a basis for jurisdiction.

Defendant cites several Montana cases which hold that for a business to be "found" in Montana, it is necessary that the Defendants' activities are substantial or systematic and continuous. The question presented the Court then is whether Washington Mutual has engaged in substantial or systematic and continuous activities within Montana. In addition, the question also arises whether a parent corporation is subject to jurisdiction by the activities of its subsidiary.

There is ample evidence that Murphey Favre promoted and sold investments that were backed and managed by Washington Mutual, and was a conduit for such business. All facts to be considered, the facts presented by Plaintiffs in this matter, in the form of affidavits and exhibits, must be accepted as true for purposes of this motion. *Jackson v. Kroll, Pomerantz and Cameron*, (1986) 223 Mont. 161, 724 P.2d 717. Plaintiffs maintain that Murphey Favre promotes itself as being a member of the "Washington Mutual Financial Group" and as being backed by Washington Mutual by virtue of its financial prominence. Further, WM solicits the sale of and sells its own certificates of deposit and debentures to Montana residents through Murphey Favre. These contentions are sufficient to evoke general jurisdiction.

Plaintiffs also make persuasive arguments for application of specific jurisdiction over a parent corporation. In the *Jones Enterprises, Inc. v. Atlas Service Corporation*, 442 F.2d 1136 (9th Cir. 1971), the court held that where a defendant purposefully sets his product or design (in that case, defective architectural renderings) into the stream of commerce, knowing or having reason to know that they will reach the forum state and that they create a potential risk of injury, that is sufficient to bring the nonresident into the forum state's jurisdiction. In this

instance, Washington Mutual prepared a financial report analyzing the Homestead investment, which was distributed to Murphey Favre representatives in Missoula, Montana. Marketing of the investment was then done based on the analysis and promotion. This is sufficient minimum contact for exercise of personal jurisdiction. Washington Mutual benefitted by this relationship, and it would be disingenuous to assert otherwise.

Defendants' Motion to Vacate Order Allowing Communication

The Court determined in its Order of December 5, 1994, that Plaintiffs could contact Montana Homestead bond purchasers regarding the instant action. Defendants request the Court to reconsider and vacate the Order, pursuant to Rule 59(g), Mont.R.Civ.P. Alternatively, Defendants seek a modification allowing for an agreed upon form for contact, or a form approved by the Court in the event agreement cannot be reached.

After careful review of the briefs, and review of the remainder of the voluminous record in this matter, the Court hereby declines to vacate its previous Order.

The Washington Court determined that the class notice in that action was sufficient, and did not require comparisons of class member rights under different state laws. While the Court agrees with this precept, it continues to find it problematic that many Montana purchasers apparently were never made aware at all of a parallel Montana action. In *Phillips Petroleum Co. v. Shutts*, (1985) 472 U.S. 797, 811-12, the U.S. Supreme Court determined that due process requires several conditions to be satisfied before a distant state forum may subject non-resident class members to judgment entered in a class action. A key provision is that the class mem-

bers must be notified of their rights. This Court has attempted to ensure that the Montana purchasers be apprised of the Montana action, thereby allowing them a choice. They have not been so notified, through no fault of Plaintiffs' counsel, and this in itself may be sufficient to invalidate the Washington court's exercise of jurisdiction over the Montana bond purchasers. Further, the Court has been witness to the deluge of documents, which have tended to obfuscate and delay rather than enlighten and expedite these proceedings. For these reasons, the Court feels notification is still a relevant and proper procedure. However, the Court finds merit in presenting the Montana purchasers with an agreed upon form. Counsel may proceed to draft such a form, and shall notify the Court if agreement cannot be reached.

Plaintiffs' Motion for Class Certification

Plaintiffs seek to certify the entire class of Montana bond purchasers, including those who have expressly "opted in" the Washington State class action. Plaintiffs conceive of a procedure wherein those who wish to remain in the Washington action may do so, those who wish to "opt out" may do so in favor of this action, and those failing to respond would be included in the Montana action.

Defendants strongly contest that class certification is appropriate in this action. The Court find it curious that class action has been sustained in the Washington suit for bond purchasers, yet Defendants maintain Montana bond purchasers cannot meet the standards imposed by Rule 23(b)(3). Defendants do not address this discrepancy. The Defendants consented to certification in Washington under the same rule, but balk in this instance, when, presumably, it does not meet their objectives.

Defendants can, through advanced scrutiny, point out various differences between class members as to questions of fact or law. Were such detailed scrutiny to by utilized by courts in determining the efficacy of class certification, it is unlikely class certification would ever occur. The Court has reviewed the cases cited by the parties, and finds that *McDonald v. Washington*, (1993) 261 Mont. 392, 862 P.2d 1150, is controlling, and validates Plaintiffs' assertions that class action is appropriate in this matter.

The six necessary elements for class certification under Rule 23(a) and (b)(3), Mont.R.Civ.P., are:

1. The class must be so numerous that joinder of all members is impractical.
2. There must be questions of fact or law common to the class.
3. The claims or defenses of the representative parties must be typical of the claims or defenses of the proposed class.
4. The representative parties will fairly and adequately protect the interest of the proposed class.
5. The questions of law or fact common to the members of the class predominate over questions of the individual members.
6. The class action is superior to other methods of adjudicating the controversy.

The first two elements are not contested by Defendants. When the facts of this case are compared with those in *McDonald*, the remaining elements also are adequately established.

Mr. Lynn's claims are typical of the class, as there is "a nexus between the injury suffered by [Lynn] and the

injury suffered by the class." *McDonald*, 261 Mont. at 402. Further, the Court noted that "a named Plaintiff's claim is typical if it stems from the same *event, practice*, or *course of conduct* that forms the basis of the class claims and is based upon the same legal or remedial theory." (Emphasis supplied.) The claims are quite apparently typical in this matter. While there may be individual reliance issues in this action, they may be resolved separately, and to no great detriment of judicial economy.

As for fair and adequate protection of the interests of the proposed class, the Court is convinced that these parties through this action will be adequate if not better representatives than those in the Washington action.[1] Counsel, in particular Mr. Youtz, have established themselves as well versed in this type of proceeding, and the Court has no doubts as to their abilities and the resolve of Plaintiff Lynn.

Regarding whether questions of law or fact common to the members of the class predominate over questions of the individual members, the Court understands that issues of reliance and subsequent damages will differ between members, but that a common course of conduct does predominate in this matter, and that individual determinations about damage does not preclude class a determination.

Finally, whether class action is superior to other methods of adjudicating the controversy, the Court finds that where these damage cases involve basically the same

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[1] This is in reference to the portion of Montana bond purchasers who neither affirmatively opted in or opted out of the Washington action, and appear to be in a remunerative limbo.

proof, where a portion of the bond holders will not receive a monetary award in the Washington action, and where it is unlikely that some investors will individually pursue a course of action, class action is here, as was determined of similarly situated investors in the Washington case, a superior method of adjudication.

DATED this 27th day of July, 1995.

/s/John S. Henson
JOHN S. HENSON
District Judge

cc: Bruce A. McKenzie
Donald Snavely
Camden M. Hall
John D. Lowery
R. Keith Strong

APPENDIX C

CIVIL TRACK I
JUDGE STEVEN SCOTT

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

NO. 93-2-06519-1

MARGARET WRIGHT, an individual, et al.,

Plaintiffs,

v.

MURPHEY FAVRE, INC.,
a Washington corporation, et al.,

Defendants.

FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE

This matter came before the Court to determine whether there is any reason why this Court should not approve the proposed settlement (the "Settlement") set forth in the Stipulation of Settlement dated August 11, 1994, and filed with this Court, relating to the above-captioned action (the "Stipulation").[1]

The Court entered the Order Certifying Class and Preliminarily Approving Settlement and Approving the Form and Manner of Notice (the "Certification Order") on

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[1] Unless otherwise defined in this Final Judgment and Order of Dismissal With Prejudice ("Final Judgment"), capitalized terms used in this Final Judgment shall have the meanings given to them in the Stipulation.

August 11, 1994. The Certification Order directed that notice of the pendency of the action and proposed Settlement of the action be mailed to the Class and scheduled a hearing to be held to determine whether the proposed settlement should be approved as fair, reasonable and adequate. In accordance with the Stipulation and Certification Order, Plaintiffs caused to be mailed to the Class a Notice of Pendency and Settlement of Class Action (the "Notice") dated August 19, 1994, and caused to be published one time in the national edition of *The Wall Street Journal*, and twice in a daily edition of *The Missoulian, The Oregonian, The Seattle Post-Intelligencer, The Seattle Times*, and *The Spokane Spokesman Review* a summary notice (the "Summary Notice") of the pendency of the proposed Settlement of the Litigation and of the opportunity to object to the Settlement. Affidavits and/or declarations concerning mailing of the Notice and publication of the Summary Notice were filed with the Court on November 23, 1994.

Plaintiffs and Defendants have applied to the Court for final approval of the terms of the Stipulation and for entry of this Judgment. Pursuant to the Notice and Summary Notice, and upon notice to all parties, a hearing was held before this Court on December 15, 1994, to consider whether the Settlement set forth in the Stipulation should be approved by this Court as fair, reasonable and adequate. At that hearing, all interested Persons were given an opportunity to be heard.

The Court has now considered the pleadings filed and proceedings and hearings had in this matter. Being fully informed, the Court finds and concludes that:

1. The Notice and the Summary Notice constitute the best notice practicable under the circumstances and provided individual notice to all Class Members who could

be identified by reasonable effort. The Notice properly informed persons in the Class of their rights under the Settlement, including, without limitation, the right to opt out and pursue individual actions, and the consequences of failing to opt out. The affidavits or declarations filed with this Court on November 23, 1994, demonstrate that this Court's orders with respect to the Notice and Summary Notice have been complied with and further, that the best notice practicable under the circumstances was in fact given and constituted valid, due, and sufficient notice to members of the Class, complying fully with due process and Rule 23 of the Superior Court Civil Rules.

2. The proposed Settlement set forth in the Stipulation is fair, reasonable and adequate. In reaching this determination, the Court has considered, among other things, a comparison of the potentially applicable provisions of Montana law and Washington law. In light of the benefits and detriments to persons in the Class arising under each state's law, the Court finds that the Settlement is fair, reasonable and adequate to all members of the Class, including, without limitation, Montana Homestead Bond purchasers.

3. Approval of the Stipulation will result in substantial savings in time and money to the litigants and will further the interests of justice.

4. The Stipulation and the Settlement are the product of extensive arm's length negotiations by the parties on whose behalf they were signed. Both in the litigation and the settlement negotiations, the Class Representatives adqequately represented all persons in the Class, including, without limitation, Montana Homestead Bond purchasers.

Now therefore, it is ORDERED that:

1. The Court has jurisdiction over the subject matter of this litigation and has personal jurisdiction over all parties to this litigation, including all Class Members.

2. The Court approves the Settlement set forth in the Stipulation and concludes that the Settlement is, in all respects, fair, reasonable and adequate to the Class and Class Members and within the authority of the parties.

3. Neither this Final Judgment, the Stipulation nor the Settlement is an admission or an indication by the Defendants, or any of them, of the validity of any claims in this litigation or of any liability or wrongdoing or of any violation of law by them or any of them. The terms and provisions of paragraphs VI and VIII(L)(1) of the Stipulation are incorporated by reference as though fully set forth herein. The Final Judgment, the Stipulation and the Settlement are not concessions, and none of them shall in any way be used as an admission or indication with respect to any Released Claims of any wrongdoing, fault or omission by any Defendant or any other Released Party. Neither this Final Judgment, nor the Stipulation, the Settlement, nor any related document, proceeding or action, nor any reports or accounts thereof, shall be offered or received in evidence in any civil, criminal, or administrative action or proceeding, other than such proceedings as may be necessary (a) to consummate or enforce the Stipulation and Settlement and all releases given thereunder, or (b) to determine whether the Defendants, individually or collectively, or any insurer or reinsurer, are entitled to be reimbursed or indemnified by others for any payment made or to be made to the Homestead Bond Settlement Fund, the Homestead Bond Notice and Administration Fund, or portions thereof, or to be reimbursed or indemnified by

others for attorney fees, costs and expenses associated with this litigation, or (c) to establish the affirmative defenses of res judicata or collateral estoppel.

4. This action is DISMISSED on the merits and with prejudice against all Class Members in favor of each and all of the Defendants and without costs to any of the parties as against any other party.

5. All Class Members are forever barred and permanently enjoined from prosecuting, commencing or continuing any Released Claims, either directly, representatively, or in any other capacity, based upon the facts, transactions, events, occurrences, acts, misrepresentations or omissions alleged in, arising out of, or in any way related to the allegations in the Second Amended Complaint, or based on, related to, or arising out of the subject matter of the Second Amended Complaint, against any of the Released Parties. All Class Members shall be conclusively deemed to have released and discharged any and all of the Released Parties of and from any and all Released Claims, whether or not they have filed a Proof of Claim and Release.

6. Persons within the Class who have validly and timely requested exclusion from the Class, and who are identified in the accompanying Attachment 1, are not Class Members and may pursue only their own individual claims and remedies, if any. Such persons may not pursue such claims or remedies against Defendants as members or representatives of a class action.

7. The Court hereby approves the proposed Plan of Allocation set forth in paragraph VIII(E)(3) of the Stipulation.

8. The Notice of Pendency of Class Action, Proposed Settlement of Class Action and Hearing, etc. ("Settle-

ment Notice"), given to the Class which sets forth the principal terms of the Stipulation and other matters was the best notice practicable under the circumstances, including individual notice to all Persons in the Class who could be identified through reasonable efforts. The Settlement Notice and the Summary Notice of Hearing on Proposed Settlement provided due and adequate notice of these proceedings and of the matters set forth, including the Settlement, to all persons entitled to such notice, and said notices fully satisfied the requirements of Rule 23 of the Superior Court Civil Rules and the requirements of constitutional due process.

9. Class Counsel are awarded fees of $3,600,000.00 and reimbursement of expenses and disbursements from prosecuting this action of $47,369.29 and Notice and Administration Costs of $43,464.76, to be paid from the Homestead Bond Settlement Fund after the Effective Date of this Final Judgment.

10. Without affecting the finality of this Final Judgment in any way, the Court retains continuing jurisdiction over (a) implementation of this Settlement and any distributions to Authorized Claimants, Defendants and Insurers pursuant to the Stipulation or further orders of this Court; (b) disposition of the Homestead Bond Settlement Fund and the Homestead Bond Notice and Administration Fund; (c) hearing and determination of applications for attorney fees and expenses, if any; (d) all parties to this action and all Class Members for the purpose of enforcing and administering the Settlement; and (e) any other matters related or ancillary to the foregoing.

11. In the event that the Stipulation of Settlement is terminated or canceled, or if the Effective Date does not occur for any reason, then this Final Judgment, the Stipulation and the Settlement shall be rendered null and

void and shall be vacated, and in such event, all orders entered in connection therewith, except those portions of said orders involving return of the Homestead Bond Settlement Fund, the Homestead Bond Notice and Administration Fund, and any interest thereon to Defendants and Insurer, shall be vacated and rendered null and void.

DATED this 15th day of December, 1994.

/s/ Steven Scott
HON. STEVEN SCOTT
Superior Court Judge

Presented by:

SHORT CRESSMAN & BURGESS

/s/ James A. Oliver
James A. Oliver
WSBA No. 217
Attorneys for Plaintiffs

FOSTER PEPPER & SHEFELMAN

/s/ Camden M. Hall
Camden M. Hall
WSBA No. 146
Attorneys for Murphey Favre, Inc., and All Individual Defendants except Hobbs

BOGLE & GATES

/s/ Evan L. Schwab (per telephone authority for)
Evan L. Schwab
WSBA No. 2174
Attorneys for Defendants Hobbs

RIDDELL, WILLIAMS, BULLITT & WALKINSHAW

/s/ John D. Lowery
John D. Lowery
WSBA No. 6633
Attorneys for Defendants Washington Savings Bank, Inc., and WM Financial, Inc.

ATTACHMENT I

LIST OF PERSONS WHO TIMELY AND VALIDLY REQUESTED EXCLUSION FROM THE CLASS

Kirk D. Comiskey & Margaret E. Mandell
Ernest W. Amundsen
Joann Kregosky
Louise M. Caras
George D. Caras
Robert G. DeMarois and Billie L. DeMarois
DeMarois Olds-GMC
Scott D. Erler, D.D.S., P.C. Profit Sharing Plan, Scott D. Erler, Trustee
Duane A. Felstet
Paul M. Lynn
James F. McCallum
Sirco Manufacturing, Inc. Employee Profit Sharing Plan (f.k.a. Bascorp Employee Profit Sharing Plan)
Allergy & Asthma Clinic for Western Montana, P.C. Employee Pension & Profit Sharing Plan
Thomas Dell, Trustee, Bell Educational Trust
William R. Blair & Mary O. Blair
Myrtle J. Buls, Trustee

APPENDIX D

The Honorable Steven Scott

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 93-2-06519-1

MARGARET WRIGHT, an individual; RODERICK KIRKWOOD and JANE DOE KIRKWOOD, husband and wife; GENE V. CUSHWAY, an individual; JACK LEACH and THELMA L. LEACH, husband and wife; ON THEIR OWN BEHALF AND ON BEHALF OF AND AS CLASS REPRESENTATIVES OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

v.

MURPHEY FAVRE, INC., a Washington corporation; WASHINGTON MUTUAL SAVINGS BANK, INC., a Washington corporation; WM FINANCIAL, INC., a Washington corporation; LEE J. SAHLIN and JANE DOE SAHLIN, husband and wife; BEN L. BROOKS and JANE DOE BROOKS, husband and wife; KIENTZENE M. FELICE and JANE DOE FELICE, husband and wife; DAVID C. LYNCH and JANE DOE LYNCH, husband and wife; LOUIS H. PEPPER and JANE DOE PEPPER, husband and wife; KERRY K. KILLINGER and JANE DOE KILLINGER, husband and wife; MICHAEL D. TOWERS and JANE DOE TOWERS, husband and wife; WILLIAM G. PAPESH and JANE DOE PAPESH, husband and wife; GENE G. BRANSON and JANE DOE BRANSON, husband

and wife; CRAIG S. HOBBS and JANE DOE HOBBS, husband and wife; CRAIG E. TALL AND JANE DOE TALL, husband and wife; DAVID J. DIRECTOR and JANE DOE DIRECTOR, husband and wife,

Defendants.

ORDER DENYING MONTANA PLAINTIFFS' MOTION TO DISMISS FOR LACK OF JURISDICTION OVER MONTANA INVESTORS

This matter came before the Court on the Motion to Dismiss for Lack of Jurisdiction Over Montana Investors (the "Jurisdiction Motion") filed by Sirianni & Youtz and Mr. Donald Snavely (~~collectively "Montana Counsel"~~) as counsel for Mr. Paul Lynn, who were purporting to act on behalf of all Montana purchasers of Homestead Bonds. In connection with the Jurisdiction Motion, the Court also considered Plaintiffs' and Defendants' Joint Motion for Order Directing Claims Administrator to Disregard Improper Request for Exclusion from Settlement Class (the "Joint Motion").

The Court considered the Joint Motion, the Jurisdiction Motion and the additional following papers submitted by the parties to this action, through their counsel of record, and by Montana Counsel:

1. Declaration of Tim J. Filer in Support of Plaintiffs' and Defendants' Joint Motion for Order Directing Claims Administrator to Disregard Improper Request for Exclusion from Settlement Class (dated November 14, 1994);
2. Declaration of Donald V. Snavely (dated October 3, 1994);
3. Opinion and Order from the Hon. John S. Henson, in the case of *Lynn et al. v. Murphey*

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Favre, Inc., et al., Montana Fourth Judicial District Court, Missoula County, Montana, Cause No. 77454 (the "Montana Action") (dated February 16, 1994);

4. Declaration of Jack Demarois (dated November 28, 1994);
5. Declaration of Robert E. Hibbs (dated November 16, 1994);
6. Response of Washington Mutual to Lynn's Motion to Dismiss for Lack of Jurisdiction Over Montana Investors (dated December 1, 1994);
7. Declaration of James A. Oliver (dated November 16, 1994);
8. Declaration of James A. Oliver in Response to Paul Lynn's Motion to Dismiss for Lack of Jurisdiction (dated December 1, 1994);
9. Further Declaration of Robert E. Hibbs (dated November 30, 1994);
10. Plaintiffs' Memorandum in Opposition to Motion by Paul Lynn to Dismiss Montana Investors (dated December 1, 1994);
11. Murphey Favre and Individual Defendants' Memorandum in Opposition to Motion to Dismiss for Lack of Jurisdiction Over Montana Investors (dated December 1, 1994); and
12. Supplemental Declaration of Tim J. Filer (dated December 1, 1994).

The Court held a hearing in open court on the Joint Motion and the Jurisdiction Motion on December 2, 1994. The Court heard oral argument from counsel of record for the parties to this action and from ~~Montana~~ Counsel. For Mr. Lynn The Court determined at the December 2,

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1994 hearing that the Jurisdiction Motion should be denied and directed the parties to prepare an order to that effect. A copy of the transcript of the Court's oral ruling is attached to this Order as Exhibit A.

Having considered the record and the arguments of counsel, the Court makes the following findings:

1. ~~Montana~~ Counsel represent the persons who have filed requests for exclusion from this action, including Paul M. Lynn. ~~Montana~~ Counsel have presented no evidence that any person or entity other than the persons who have opted out of the settlement in this case have actually authorized either ~~Montana~~ Counsel or Mr. Lynn to act on their behalf. The only class members in this case who have requested exclusion from the settlement are the persons and entities actually represented by ~~Montana~~ Counsel. In addition, the deadline for class members to submit objections to the settlement has now passed, and the Court has not received any objections from members of the class.

2. Mr. Lynn, through ~~Montana~~ Counsel, filed a lawsuit in Montana state court in February 1993, against Murphey Favre, Inc., Washington Mutual Savings Bank and certain individuals relating to Murphey Favre's sale of Homestead Bonds (the "Montana case"). The initial complaint in the Montana case was not served. The First Amended Complaint in the Montana case was not served until July 1993, approximately four months after commencement and service of the initial complaint in this action.

3. The Montana case is a putative class action. Mr. Lynn is the sole proposed class representative on behalf of a proposed class consisting of all Montana residents who purchased Homestead Bonds from Murphey Favre and all other persons who purchased Homestead Bonds through Murphey Favre's offices in Missoula, Montana. To date, no motion for class certification has been filed and no class has been certified in the Montana case. There has been no agreement among counsel in the Montana case to postpone the filing of the class certification motion.

4. ~~Montana~~ Counsel FOR MR. LYNN and Mr. Lynn have known since at least May 1994, that the proposed settlement in this case included all purchasers of Homestead Bonds, regardless of their state of residence or place of purchase. ~~Montana~~ Counsel FOR MR. LYNN objected to this Court's personal jurisdiction over Montana purchasers of Homestead Bonds based on alleged deficiencies in the form of the Notice of Pendency of Class Action, Proposed Settlement of Class Action, and Hearing on Proposed Settlement (the "Class Notice"), and on the alleged inability of the class representatives in this case to adequately represent the Montana purchasers on November 28, 1994, when they filed the Jurisdiction Motion. In light of the passage of time and the expenditures of funds from the settlement funds for mailing and publishing notice of the settlement to the class and the expenditure of resources by the parties, the delay in asserting these objections was not reasonable and could result in unfair prejudice to the parties to this case.

5. ~~Montana~~ Counsel for Mr. Lyon and their clients have had a full and fair opportunity to raise their objections to (a) the form of the Class Notice, (b) the adequacy of the class representatives in this case with respect to Montana purchasers of Homestead Bonds and (c) this Court's personal jurisdiction over the absent class members. ~~Montana~~ Counsel for Mr. Lyon and their clients have submitted the Jurisdiction Motion, papers in opposition to Plaintiffs' Motion for Order Allowing Communications to Class and ~~by having~~ Mr. Youtz has appeared and argued in hearings before this Court on November 17, 1994, and December 2, 1994.

6. The requirements for certifying this case as a plaintiff class action for settlement purposes have been satisfied.

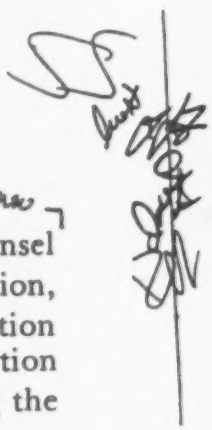
7. The class representatives in this case have more than adequately represented all members of the class, including Montana purchasers of Homestead Bonds. The record before the Court demonstrates that Class Counsel is qualified to act as counsel for the class, that there is a lack of antagonism among the interests of the class members and that there is absolutely no evidence that the settlement entered into by the parties was a result of collusion. To the contrary, the record shows that this case was vigorously contested and that the settlement was entered into after good faith, arms-length negotiations.

8. The Class Notice and the mechanisms used in this case to notify the class of the settlement fully satisfy all of the requirements of CR 23 and the requirements of

constitutional due process. The Class Notice fairly advises class members of the terms of the settlement, their rights under the settlement and the steps necessary to assert a claim under the settlement or to exclude themselves from the settlement class. The Class Notice also fairly advises class members of the consequences of not responding to the Class Notice.

Accordingly, the Court rules and orders as follows:

1. *Standing.* Mr. Lynn is not authorized to challenge this Court's jurisdiction over absent members of the settlement class. Mr. Lynn's status as a putative class representative in a case in which no class has been certified does not authorize him to raise the question of this Court's jurisdiction over absent class members. Mr. Lynn also lacks standing to object to this Court's jurisdiction over absent class members because he has opted out of the settlement class. Finally, Mr. Lynn, individually is barred from raising these objections under the doctrines of laches and equitable estoppel.



FOR MR. LYNN

2. *Jurisdiction.* However, because ~~Montana~~ Counsel have raised questions concerning this Court's jurisdiction, the Court has considered the merits of the Jurisdiction Motion. The Court rules that it has personal jurisdiction over the absent class members in this case, including the Montana purchasers of H[illegible]mestead Bonds.

a. *Sufficiency of Notice.* Neither CR 23 nor concerns of constitutional due process dictate that the Class Notice should have contained a comparison of the class

members' rights under the laws of the various states in which they reside, nor should the Class Notice have set forth counsel's competing viewpoints concerning which state's laws are more beneficial to class members. Including these items in the Class Notice would have rendered it unwieldy and potentially confusing to class members.

The Court rejects ~~Montana Counsel's~~ contention that the "opt out" procedures set forth in the Class Notice are too onerous. The Class Notice properly advised the class members of the settlement and their rights under the settlement and was sufficient for all purposes under CR 23 and the requirements of due process.

b. *Adequacy of Representation.* Class Counsel and the class representatives have vigorously represented the interests of the absent class members. The absent class members have been adequately represented such that the Court may exercise personal jurisdiction over them.

3. *Fairness.* The Court reserves consideration of the fairness of the proposed settlement for the Final Settlement Hearing scheduled for December 15, 1994. At that hearing, the Court will consider, among other things, comparisons between the potentially applicable state law which could govern the class members' claims as part of the overall determination of the fairness of the settlement.

Accordingly, the Jurisdiction Motion is DENIED.

DATED: 12-15-94.

/s/Steven Scott
HON. STEVEN SCOTT

Presented by:

FOSTER PEPPER & SHEFELMAN

/s/ Camden M. Hall
Camden M. Hall, WSBA No. 146
Tim J. Filer, WSBA No. 16285
Attorneys for Murphey Favre, Inc., and
All Individual Defendants except Hobbs

Approved as to form; notice of
presentation and entry waived:

SIRIANNI & YOUTZ

/s/ Chris R. Youtz
Chris R. Youtz
WSBA #7786
Attorneys for Plaintiffs in
the Montana Action

RIDDELL, WILLIAMS,
BULLITT & WALKINSHAW

/s/ John D. Lowery
John D. Lowery
WSBA #6633
Attorneys for Defendants
Washington Mutual Savings
Bank, Inc., and WM Financial, Inc.

SHORT CRESSMAN &
BURGESS

/s/ James A. Oliver
James A. Oliver WSBA #217
Attorneys for the Class

BOGLE & GATES

/s/ Evan L. Schwab (per telephone authority for)
Evan L. Schwab WSBA #2174
Attorneys for Defendants Hobbs

APPENDIX E

No. 95-381

IN THE SUPREME COURT
OF THE STATE OF MONTANA

THE STATE OF MONTANA ON
THE RELATION OF MURPHEY FAVRE, INC., et al.,

Relators,

v.

THE DISTRICT COURT OF THE FOURTH
JUDICIAL DISTRICT OF THE STATE OF
MONTANA, IN AND FOR THE COUNTY OF
MISSOULA, THE HONORABLE JOHN S. HENSON,
Presiding Judge, and PAUL M. LYNN, on behalf
of himself and all similarly situated persons, et al.,

Respondents.

On Application from the District Court of the
Fourth Judicial District of the State of Montana,
in and for the County of Missoula

RELATORS' APPLICATION FOR WRIT
OF SUPERVISORY CONTROL OR ANY
OTHER APPROPRIATE WRIT OF RELIEF
AND REQUEST FOR STAY

APPEARANCES:

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(206) 223-0303

Attorneys for Respondents

TO THE SUPREME COURT OF THE STATE OF MONTANA:

Relators Murphey Favre, Inc.; Douglas Springer; Gregory Ondrak; and James Royan ("Relators") apply for a writ of supervisory control or other appropriate relief pursuant to the authority vested in the Supreme Court by Mont. Constitution Article VII, Section 2(2) (1994), and M.R. App. P. 17.[1] In support of this application, Relators allege:

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[1] Relators seek this relief against all of the named plaintiffs in the action below. With two exceptions, those plaintiffs are identified in the caption of the Second Amended Complaint for

[footnote continued]

1. **Nature Of The Case.** Relators seek relief in this Court to correct a manifest error of law committed below. On July 27, 1995, the trial court certified this case (a case involving securities known as "Homestead Bonds") as a class action. That order was entered in error because on December 15, 1994, a court in the state of Washington approved a class action settlement and entered a final judgment dealing with the same claims and the same class (the "Homestead Class") part of which was certified by the trial court below. The class-wide settlement approved by the Washington court extinguished the claims of *all* members of the Homestead Class *except* the 16 named plaintiffs in this case. The claims of the named plaintiffs in this case survived because they expressly requested exclusion from the Homestead Class settlement. No other Homestead Class members requested exclusion.

At the request of counsel for the Montana plaintiffs, the Washington court considered extensive briefing and argument on the question of its jurisdiction over Montana residents who were members of the Homestead Class. After carefully considering the arguments presented by counsel for the Montana plaintiffs, the Washington court ruled that all of the requirements of Rule 23 and constitutional due process had been satisfied and that it had personal jurisdiction over *all* Homestead Class members except those expressly requesting exclusion by opting out of the Homestead Class settlement. Despite this ruling, which was before the court below, that court certified a

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Damages and Other Relief and Demand for Jury Trial. A copy of the caption is included at Tab 1 of the Appendix to this Application. Plaintiffs Sharon Schroeder and James Schroeder are not necessary parties to this appeal because their claims were dismissed pursuant to an order entered on January 10, 1995.

class (respondent Lynn as class representative) of all Montana residents who purchased Homestead Bonds from Murphey Favre, whether or not they had excluded themselves from the Homestead Class.

2. **Purely Legal Issue Presented.** The trial court's order certifying a class in this case violates the Full Faith and Credit clause of the United States Constitution and M.C.A. §26-3-203, causes unnecessary confusion concerning the effect of the Washington settlement, and has the potential to impose significant and unnecessary litigation expenses on all parties. This Application raises a purely legal question:

> Is the Washington court's Final Judgment, entered after full briefing and oral argument in Washington by both sides in the present action, which dismissed the claims of all members of the Homestead Class who did not properly opt out of the Washington action, including those residing in Montana, entitled to Full Faith and Credit by the courts of the state of Montana?

The issuance of a writ of supervisory control is especially appropriate when the relator seeks review of purely legal issues. *See Grossman v. State Dep't of Natural Resources*, 209 Mont. 427, 682 P.2d 1319, 1324 (1984). Early consideration of the effect of the Washington settlement will also promote the strong Montana public policy in favor of resolving litigation through settlement. *See DeTienne Assocs. Ltd. Partnership v. Montana RailLink, Inc.*, 264 Mont. 16, 869 P.2d 258, 267 (1994) (public policy is to encourage compromises and settlements). The only facts relevant to his Court's consideration of this Application relate to the procedural history of the cases. These facts are summarized below.

3. **Washington Class Action Filed.** In March 1993, a securities class action (the "Washington action") was filed against and served upon Murphey Favre, Inc., and other defendants in the Superior Court of Washington for King County. The resulting Homestead Class was defined to include all persons who had purchased Homestead Bonds from Murphey Favre, Inc., including purchasers residing in Washington, Oregon, Idaho, California *and Montana.*

4. **Washington Class Action Settled.** After conducting discovery and motion practice, counsel for the Homestead Class representatives engaged in settlement negotiations with the defendants. After several days of intense mediation, the parties reached a settlement on May 17, 1994, under which Relators agreed to pay $12 million for dismissal of the claims of *all* Homestead Class members against all parties. Plaintiff Lynn's counsel was notified of the scope and terms of the settlement the next day. A stipulation of settlement was entered in the Washington action on August 11, 1994. The Washington court then granted preliminary approval of the settlement and certified the Homestead Class for settlement purposes. Class Counsel in the Washington case mailed personal notices to all class members and published notice of the settlement in national and regional publications (including the *Missoulian* in Missoula, Montana) in accordance with the Washington court's order. Missoula is the location of Murphey Favre's office in Montana. During the opt-out period specified in the notice, *only* the 16 named plaintiffs in the Montana action excluded themselves from the settlement in Washington so they could pursue their claims in the action below. These were the *only* members of the Homestead Class who excluded themselves from the settlement. Under the

terms of the settlement, anyone not requesting exclusion was bound by its terms. Montana residents who submitted claims in accordance with the requirements of the settlement have either been paid or have had their claims approved for payment by the Washington court.

5. **Montana Plaintiffs Challenged Washington Court's Jurisdiction.** On November 28, 1994, more than six months after receiving notice of the settlement of the Washington action, *counsel for Lynn* filed *in the Washington action* a motion to *dismiss* the claims of all Montana Homestead Bond purchasers on the grounds that the Washington court had no personal jurisdiction over those purchasers. Subsequently, the question of the Washington court's personal jurisdiction over the Montana members of the Homestead Class was thoroughly briefed and argued before the Washington court. *See* Appendix at Tabs 8-11.[2]

6. **Washington Court Decided The Jurisdiction Question.** The Washington court heard oral argument on the matter on December 2, 1994. On December 15, the Hon.

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[2] Relators have included in the Appendix to this Application the order from which Relators seek relief (Appendix Tab 3), the relevant orders from the Washington court (Appendix Tabs 4, 5 and 6) and excerpts of the briefing submitted to the Washington court on the jurisdiction issues (Appendix Tabs 8-11) and before the Montana court on the Full Faith and Credit and jurisdiction issues (Appendix Tabs 12-17). All of these materials were before the trial court below as exhibits to the Affidavit Of Camden M. Hall In Support Of Murphey Favre, Inc.'s Motion To Vacate Order Allowing Communication With Montana Bond Purchasers (Docket No. 100). A certified copy of the relevant portion of the trial court's docket sheet demonstrating the record before the trial court is included at Appendix Tab 2. Relators incorporate those materials by reference and will make them available to the Court upon its request.

Steven Scott entered his Order Denying Montana Plaintiffs' Motion To Dismiss For Lack Of Jurisdiction Over Montana Investors ("Jurisdiction Order"), which expressly stated, in part:

> The Court heard oral argument from counsel of record for the parties to this action and from Counsel for Mr. Lynn . . . .
>
> In light of the passage of time and the expenditures of funds from the settlement funds for mailing and publishing notice of the settlement to the class and the expenditure of resources by the parties, *the delay in asserting these objections was not reasonable and could result in unfair prejudice to the parties in this case* . . . .
>
> Counsel for Mr. Lynn and their clients *have had a full and fair opportunity to raise their objections* to (a) the form of the class notice, (b) the adequacy of the class representatives in this case with respect to Montana purchasers of Homestead Bonds, and (c) *this Court's personal jurisdiction over the absent class members.* Counsel for Mr. Lynn and their clients have submitted the Jurisdiction Motion, papers in opposition to Plaintiffs' Motion for Order Allowing Communications to Class and Mr. Youtz has appeared and argued in hearings before this court on November 17, 1994, and December 2, 1994.
>
> Accordingly, the Court rules and orders as follows:
>
> 1. . . . *Mr. Lynn, individually, is barred from raising these objections* under the doctrines of laches and estoppel.
>
> 2. . . . because counsel for Mr. Lynn have raised questions concerning this court's jurisdiction, the court has considered the merits of the Jurisdiction Motion. *The Court rules that it has personal juris-*

diction over the absent class members in this case, including the Montana purchasers of Homestead Bonds.

a. . . . The Class Notice properly advised the class members of the settlement and their rights under the settlement and was sufficient for all purposes under CR 23 and the requirements of due process.

Appendix Tab 5 (Jurisdiction Order at 5-6 (emphasis added)). *See also* Appendix Tab 4 (Order Granting Joint Motion For Order Directing Claims Administrator To Disregard Improper Request For Exclusion From Settlement Class).

7. **Washington Court Enters Final Judment.** On December 15, 1994, Judge Scott entered a Final Judgment And Order Of Dismissal With Prejudice ("Final Judgment") in the Washington action. Judge Scott's Final Judgment stated:

Both in the litigation and the settlement negotiations, the Class Representatives adequately represented all persons in the Class, including, without limitation, Montana Homestead Bond purchasers.

The Court has jurisdiction over the subject matter of this litigation and *has personal jurisdiction over all parties to this litigation*, including all class members.

This *action is DISMISSED on the merits and with prejudice against all Class Members* in favor of each and all of the Defendants.

All Class Members are forever barred and permanently enjoined from prosecuting, commencing or continuing any Released Claims, either directly, representatively, or in any other capacity, based upon the facts, transactions, events, occurrences, acts, misrepresentations or omissions alleged in,

> arising out of, or in any way related to the allegations. . . . All Class Members shall be *conclusively deemed to have released and discharged any and all of the Released Parties* of and from any and all Released Claims, whether or not they have filed a Proof of Claim and Release.

Appendix Tab 6 (Final Judgment at 3-4 (emphasis added)).

8. **Montana Class Action.** Lynn served a putative class action complaint on Relators in July 1993. Seventeen months later, on the day the Final Judgment was entered in the Washington action, Lynn filed his motion to certify a class of all Montana purchasers of Homestead Bonds. *See* Appendix Tab 2 (Docket No. 105). Excluding the 16 named plaintiffs, the members of Lynn's proposed class are Homestead Class members whose claims were completely resolved by the Washington court's Final Judgment.

9. **Attempts To Communicate With Montana Investors.** On December 5, 1994, the Hon. John Henson entered an Order Allowing Communication With Montana Investors ("Communication Order"), granting Lynn's motion for permission to inform each Montana purchaser of the pendency of the case below. *See* Appendix Tab 7. Relators filed a motion to vacate the communication order based on the Final Judgment in the Washington action. *See* Appendix Tab 2 (Docket No. 98).

10. **Montana Court Denied Full Faith And Credit To Washington Judgment.** Relators filed separate briefs in support of their motion to vacate the Communication Order and in opposition to Lynn's motion for class certification. *See* Appendix Tab 2 (Docket Nos. 99-101, 108, 109, 112-114); Appendix Tabs 12-17 (excerpts of briefing on Motion to Vacate). The trial court heard oral

argument on these motions on January 11, 1995. On July 27, 1995, the court issued an order certifying a class in the Montana action which encompasses *all* Montana purchasers of Homestead Bonds, denied Relators' motion to vacate, and ordered notification of the Montana action to be sent to each Montana purchaser. Appendix Tab 3. This order is the subject of relators' application.

11. **Supervisory Control Writ Appropriate For Resolving Legal Issues.** A writ of supervisory control issues when the District Court's mistake of law will cause a gross injustice, for which an appeal is an inadequate remedy. *State ex rel. Fitzgerald v. District Court*, 217 Mont. 106, 703 P.2d 148, 153-54 (1985). The writ of supervisory control is intended to advance the goals of judicial economy and justice by allowing immediate review in appropriate cases. *Id.* Here a writ is appropriate and necessary to uphold and give effect to the Full Faith and Credit clause of the U.S. Constitution. It is also necessary to avoid the extreme injustice that will result from forcing Relators to answer to allegations of liability made by Montana purchasers whose claims have already been extinguished in the Washington settlement. Relators will be substantially injured by incurring the costs of litigation they sought to avoid through settlement, *with respect to the very same individuals with whom they have already settled and paid.* Even if Relators successfully defend against the Montana class action, this will not erase either the substantial expense incurred in doing so or the trial court's direct contravention of Montana public policy favoring both the recognition of sister state judgments and the conclusiveness of settlement agreements.

12. **Failure To Give Full Faith And Credit Is Clear Legal Error.** The United States Constitution mandates that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." U.S. Const. art. IV, §1. Montana recognizes its obligations under the Full Faith and Credit Clause, M.C.A. §26-3-203 (stating, in pertinent part: "The effect of a judicial record of a sister state is the same in this state as in the state where it was made."). The Final Judgment in the Washington case dismissed the settled and released claims of all Homestead Bond purchasers with prejudice, except for those of the named plaintiffs in the Montana lawsuit. After entry of the Final Judgment, the doctrine of res judicata precludes any member of the Homestead Class from raising Released Claims before a Washington court. Under the Full Faith and Credit Clause, identical treatment must be accorded class members bringing such claims before the courts of another state.

The Washington court's ruling that it had personal jurisdiction over absent class members is also entitled to Full Faith and Credit. This outcome is dictated by mandatory United States Supreme Court precedent set forth in *Durfee v. Duke*, 375 U.S. 106, 11 L. Ed. 2d 186, 84 S. Ct. 242 (1963).

In *Durfee*, the Supreme Court held that the Full Faith and Credit Clause extends to a court's decision regarding its own jurisdiction. The Court stated: "A judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." *Durfee*, 375 U.S. at 111. Judge Scott invited, and Lynn submitted, extensive briefing

and oral argument on the question of the Washington court's personal jurisdiction over Montana purchasers. Judge Scott ultimately concluded that Lynn had received a "full and fair opportunity" to raise objections to the court's personal jurisdiction over Montana purchasers and found that personal jurisdiction existed. *See* Appendix Tab 5 (Jurisdiction Order at 4, 6); Appendix Tab 6 (Final Judgment at 3). Judge Scott's finding regarding this issue was a necessary prerequisite to his entry of the Final Judgment dismissing the claims of those individuals.

The Full Faith and Credit Clause, as well as notions of public policy advanced by the United States Supreme Court, preclude Lynn from raising *again* his argument that the Washington court had no personal jurisdiction over Montana purchasers. As stated in *Durfee*:

> [T]hose who have contested an issue shall be bound by the result of the contest, and . . . matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.

375 U.S. at 111-12. Despite the Washington court's ruling that Lynn himself was personally barred from raising jurisdictional objections, and the entry of final judgment which extinguished the claims of all Montana Bond Purchasers who did not opt out, Lynn pursued his class action efforts in Montana and the trial court below certified a class in this case.

The trial court's class certification implicates each and every concern underlying the existence of the Writ of Supervisory Control. The trial court's effective disregard

of the Final Judgment in the Washington action violates the Full Faith and Credit clause of the U.S. Constitution, as well as M.C.A. §26-3-203. It raises the possibility that Relators will bear substantial expense defending a claim against individuals whose claims it has already paid several million dollars to extinguish.

13. **Request For Stay.** In connection with this Application, Relators respectfully request that this Court stay the effectiveness of the trial court's order directing delivery of notice to "members" of the improperly certified class. Delivery of such a notice before the resolution of this application will create the possibility for confusion among the recipients of the notice. In addition, if the notice is determined to be improper, plaintiffs' counsel will have been required to incur an unnecessary expense.

WHEREFORE, Relators Murphey Favre, Springer, Ondrak, and Royan respectfully request that this Court accept jurisdiction of this cause under its power of supervisory control, vacate the trial court's Communication Order, and direct the District Court to enter an order decertifying the class and dismissing, with prejudice, all claims of Montana purchasers who did not affirmatively opt out of the Washington action. They also request a stay of the trial court's order directing delivery of a notice to class members pending resolution of these proceedings.

Respectfully submitted this 16th day of August, 1995.

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CERTIFICATE OF SERVICE

I, Tim J. Filer, do hereby certify that I served a copy of the foregoing Application for Writ of Supervisory Control or any Other Appropriate Relief and the supporting Appendix on the respondents in the above captioned action on the 16th day of August, 1995, by mailing copies addressed as follows:

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The Honorable John S. Henson
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/s/Tim J. Filer
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APPENDIX F

[Filed JAN 05 1995]

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MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY

DEPARTMENT NO. 2
(HENSON)

CAUSE NO. 77454/113

PAUL M. LYNN, on behalf of all
similarly situated persons,

Class Plaintiff,

v.

MURPHY FAVRE, INC., et al.,

Defendants.

PAUL M. LYNN, et al.,

Individual Plaintiffs,

v.

MURPHEY FAVRE, INC., et al.,

Defendants.

MURPHEY FAVRE'S REPLY MEMORANDUM
IN SUPPORT OF MOTION TO VACATE ORDER
ALLOWING COMMUNICATION
WITH MONTANA INVESTORS

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I. SUMMARY OF ARGUMENT

Murphey Favre, Inc., respectfully submits this memorandum in further support of its motion to vacate this Court's December 5, 1994 Opinion and Order. Murphey Favre and the Individual Defendants are also filing separately their Memorandum in Opposition to Plaintiffs' Motion for Class Certification. For the reasons set forth below, however, this Court need not consider or rule on the class certification motion because the claims of the putative class members (other than the plaintiffs in this case) have been extinguished by a previous judgment.

On December 15, 1994, the King County Superior Court entered its Final Judgment and Order of Dismissal With Prejudice (the "Final Judgment") in a Washington state class action arising, as does this case, from the sale of Homestead Bonds by Murphey Favre, Inc.'s registered representatives to some of their customers. The Final Judgment approved the class-wide, $2 million settlement reached by the parties in the Washington action in May 1994. In consideration of the settlement funds, the Final Judgment extinguishes the claims of *every* person who purchased Homestead Bonds from Murphey Favre *except* the claims asserted by the named plaintiffs in this action. Because Mr. Lynn and the other plaintiffs in this case opted out of the Washington settlement, the Final Judgment does not preclude *them* from pursuing their individual claims.[1]

---

[1] A copy of the Final Judgment is attached as Exhibit B to the Supplemental Affidavit of Camden M. Hall in Support of Murphey Favre, Inc.'s Motion to Vacate Order Allowing Communication With Montana Bond Purchasers dated December 16, 1994 ("Supp. Hall Affid."). Other documents referred to in this memorandum are attached to the Affidavit of Camden Hall in Support of Murphey Favre, Inc.'s Motion to Vacate Order Allowing Com-

[footnote continued]

By seeking to certify a class in this case, Mr. Lynn admits he is asking the Court to disregard the Final Judgment. Mr. Lynn's request should be denied under mandatory United States Supreme Court precedent for at least two reasons.

First, the Washington court's Final Judgment is entitled to full faith and credit under the United States Constitution and Montana statutes. This Court must therefore give the Final Judgment the same preclusive effect that it would be given in Washington. Because Mr. Lynn voluntarily appeared in Washington and litigated each of the objections to the Washington court's jurisdiction that he raises now before this Court, he is precluded from relitigating that issue by the law of full faith and credit and collateral estoppel. Mr. Lynn had:

> a full and fair opportunity to raise their objections to (a) the form of the Class Notice, (b) the adequacy of the Class Representatives in this case with respect to Montana Purchasers of Homestead Bonds, and (c) [the Washington] court's personal jurisdiction over the absent class members.

Order Denying Montana Plaintiffs' Motion to Dismiss For Lack Of Jurisdiction Over Montana Investors ("Jurisdiction Order") (Supp. Hall Affid. Ex. A) at 4. Having had one opportunity to litigate his jurisdictional challenges, Mr. Lynn is not entitled to another bite at this apple. Mr. Lynn's jurisdictional challenges are also barred under the doctrine of laches and equitable estoppel. Like his belated motion for class certification, Mr. Lynn's challenges to the Washington court's jurisdiction were simply

---

munication With Montana Bond Purchasers dated December 7, 1994 ("Hall Affid."). References to the exhibits to these affidavits will be by abbreviated name and exhibit reference, *e.g.*, "Final Judgment (Supp. Hall Affid. Ex. B) at ____."

too little and came far too late in light of his early knowlege of the scope of the Washington settlement class and the prejudice to defendants.

Second, even if this Court does not defer to the Washington court's jurisdictional determination, the record before this Court demonstrates that the Washington court properly exercised personal jurisdiction over absent class members from any state in the nation. Because the Final Judgment was entered by a court with jurisdiction to bind the absent class members, the Final Judgment properly extinguishes their claims for damages, precludes certification of a class in this case and removes any need for a communication to the absent Montana investors.[2]

---

[2]Murphey Favre and the Individual Defendants contend that the Full Faith and Credit clause precludes this Court from reaching the merits of the issues raised in plaintiffs' Brief in Opposition to Defendants' Motion to Vacate Order Allowing Communication With Montana Bond Purchasers ("Opp. to Motion to Vacate"). The Court should also refuse to consider the Opp. to Motion to Vacate because it was filed and served after the filing deadline imposed by Mont. Unif. Dist. Ct. Rule 2(a) and was received just four business days before the hearing on the motion. Murphey Favre's Motion to Vacate was served on Mr. Lynn's Seattle, Washington, counsel on December 7, 1994 and was delivered to Mr. Snavely on December 8, 1994. Rule 2(a) required Mr. Lynn to file his Answer Brief (the Opp. to Motion to Vacate) not more than 10 business days later—by December 22, 1994. Murphey Favre's counsel did not receive the Opp. to Motion to Vacate until December 29, 1994. Under Rule 2(b), "[f]ailure to file an answer brief within ten days *shall be deemed an admission that the motion is well-taken.*" Mont. Unif. Dist. Ct. Rule 2(b) (emphasis added). Mr. Lynn's counsel's untimely filing, combined with his refusal to continue the hearing date to accommodate the intervening holidays and to facilitate an orderly briefing schedule has prejudiced defendants by depriving them of the ten business days for preparing a reply brief provided under Mont. Unif. Dist. Ct. Rule 2(b). Unlike the agreed-upon briefing schedule for the class certification motion, Mr. Lynn's counsel neither requested nor obtained an extension for filing the Opp. to Motion to Vacate. Accordingly, it is untimely and should not be considered.

II. BACKGROUND

A. Murphey Favre Sold Homestead Bonds In the 1980's.

Defendant Murphey Favre, Inc. ("Murphey Favre"), is a regional, century-old securities brokerage firm. In the mid-to-late 1980's Murphey Favre sold bonds issued by Homestead Savings and Loan Association ("Homestead Bonds"), a federally chartered savings and loan association based in California. Those bonds had a market value of par (100) or better until early 1989, when the price of the bonds began a precipitous decline. By this time Mr. Lynn purchased his bonds in May 1989, the price had dropped to 75. By the end of 1989, the price had dropped to 50. During 1990, the market price of the Homestead Bonds dropped to almost nothing. In the spring of 1991, Homestead defaulted on the Homestead Bonds, and like many savings and loans, Homestead eventually failed due, in large part, to the troubled California real estate market in the late 1980's. Instead of the 13-3/8 percent or 15 percent yields for which they hoped, Homestead Bond purchasers lost a portion of their investments. In this action, Plaintiffs attempt to shift the risk of loss to Murphey Favre.

B. Mr. Lynn Unreasonably Delayed This Litigation.

Mr. Lynn served this action on defendants in July 1993, approximately four months after a putative class action had been commenced in Washington state court. The Washington action was commenced on behalf of *all* purchasers of Homestead Bonds from Murphey Favre. Mr. Lynn, in his putative class action, sought to represent a subset of those purchasers—those who resided in Montana or who purchased Homestead Bonds through Murphey Favre's Missoula, Montana office.

After extensive discovery, motion practice, settlement discussions and three days of mediation before two well-respected retired judges, the parties in the Washington case agreed to a settlement in principle on May 17, 1994, calling for defendants to pay $12 million in return for a global release from all class members who did not request exclusion from the settlement class. **Mr. Lynn's counsel was notified of the settlement, and the fact that it encompassed *ALL* Homestead Bonds purchasers, including his clients, the very next day.**

The parties in the Washington action negotiated the fine points of their settlement throughout the summer, and on August 11, 1994, entered a Stipulation of Settlement. The Washington court preliminarily approved the settlement and certified a class for settlement purposes, and, a few days later, issued the notice that was mailed to the class members. All of the settlement documents were delivered to Mr. Lynn's counsel as exhibits to Defendants' Supplemental Status Report dated August 23, 1994.

Pursuant to the settlement, the sixty-day claim and opt-out period commenced on August 25, 1994. On September 27, 1994, more than halfway through the claim period, Mr. Lynn's counsel requested leave to communicate with the members of the putative Montana class. Two months later, on November 28, 1994, (a month *after* the expiration of the claim and opt-out period) Mr. Lynn's counsel filed papers before the Washington court seeking to have Montana investors dismissed from the Washington class on the grounds the Washington court lacked personal jurisdiction over them. The Washington court denied that motion on December 15, 1994. Jurisdiction Order (Supp. Hall Affid. Ex. A).

On December 15, 1994, the court also entered its Final Judgement and Order of Dismissal With Prejudice ("Final Judgment") which provides in pertinent part as follows:

> 2. The proposed Settlement set forth in the Stipulation is fair, reasonable and adequate. **In reaching this determination, the Court has considered, among other things, a comparison of the potentially applicable provisions of Montana law and Washington law. In light of the benefits and detriments to persons in the Class arising under each state's law, the Court finds that the Settlement is fair, reasonable and adequate to all members of the Class, including, without limitation, Montana Homestead Bond purchasers.**
>
> 3. Approval of the Stipulation will result in substantial savings in time and money to the litigants and will further the interests of justice.
>
> 4. The Stipulation and the Settlement are the product of extensive arm's length negotiations by the parties on whose behalf they were signed. Both in the litigation and the settlement negotiations, the Class Representatives adequately represented all persons in the Class, including, without limitation, Montana Homestead Bond purchasers.
>
> Now therefore, it is ORDERED that:
>
> 1. **The Court has jurisdiction over the subject matter of this litigation and has personal jurisdiction over all parties to this litigation, including all Class Members.**
>
> 2. The Court approves the Settlement set forth in the Stipulation and concludes that the Settlement is, in all respects, fair, reasonable and adequate to the Class and Class Members and within the authority of the parties.

* * *

> 5. All Class Members are forever barred and permanently enjoined from prosecuting, commencing or continuing any Released Claims, either directly, representatively, or in any other capacity, based upon the facts, transactions, events, occurrences, acts, misrepresentations or omissions alleged in, arising out of, or in any way related to the allegations in the Second Amended Complaint, or based on, related to, or arising out of the subject matter of the Second Amended Complaint, against any of the Released Parties. **All Class Members shall be conclusively deemed to have released and discharged any and all of the Released Parties of and from any and all Released Claims, whether or not they have filed a Proof of Claim and Release.**

Final Judgment (Supp. Hall Affid. Ex. B) (emphasis added).

Although the plaintiffs in this action opted out of the Washington settlement and are free to pursue their individual claims, no other Montana residents or any other class members opted out of the Washington Class Action settlement. Hall Affid. ¶5. In addition, no class member filed any objections to that settlement.

Approximately 22 months *after* filing this lawsuit, *after* having known about the Washington settlement for more than six months, *after* the claim period in the Washington settlement had been over for more than two months, *after* litigating and losing on his objections to the Washington court's jurisdiction over Montana purchasers before the Washington court and *after* the Washington court entered the Final Judgment extinguishing the claims of all Homestead Bond purchasers other than the opt outs (plaintiffs herein), Mr. Lynn filed his motion for class certification. Lynn seeks certification of a class under M. R. Civ. P. 23(b)(3). Mr. Lynn's motion should

be denied because the class he seeks to represent no longer has claims against any of the defendants.

III. ARGUMENT

A. Class Certification Should Be Denied Because This Court Must Give Effect to the Washington Final Judgment Extinguishing All Claims Against Defendants Relating to Homestead Bonds Except Claims Asserted by the Opt Outs.

On December 15, 1994, the Washington court entered both the Jurisdiction Order and the Final Judgment. *See* Supp. Hall Affid. Exs. A, B. Several days prior to that, the Washington court entered an order determining that Mr. Lynn had no authority to exclude absent class members from the Washington settlement class. *See* Order Granting Joint Motion For Order Directing Claims Administrator To Disregard Improper Request For Exclusion From Settlement Class ("Opt Out Order") (Hall Affid. Tab 257). **Prior to entering the Opt Out Order, the Jurisdiction Order and the Final Judgment, the Washington court *considered and rejected* each of the arguments advanced before this Court by Mr. Lynn's counsel as to why the Final Judgment should not be binding on Montana Homestead Bond purchasers.** Counsel for Mr. Lynn and their clients were given a "full and fair opportunity" to litigate these issues before the Washington court. Jurisdiction Order (Supp. Hall Affid. Ex. A) at 4.

Mr. Lynn would have this Court reconsider the issues which Mr. Lynn voluntarily presented to the Washington court. Under the Full Faith and Credit clause of the United States Constitution and an applicable Montana statute, Mr. Lynn is not entitled to this second bite at the apple. So long as the question of the Washington court's jurisdiction over the absent class members was

"fully and fairly litigated in the court which rendered the original judgment[,]" Mr. Lynn is bound by the Washington court's determination that it had personal jurisdiction to bind the absent class members to the Final Judgment. *Durfee v. Duke*, 375 U.S. 106, 111 (1963).

There is no question that Mr. Lynn litigated the jurisdiction issues in the Washington court. Accordingly this Court should give full effect to the Final Judgment's dismissal of the claims of all absent class members who did not opt out of the Washington settlement class and deny Mr. Lynn's motion for class certification.

1. This Court Must Accord Full Faith and Credit to the Washington Final Judgment.

The Full Faith and Credit clause of the United States Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state." U.S. Const., Art. IV, §1. The Montana legislature has recognized this mandate by enacting a statute to the same effect. *See* M.C.A. §26-3-203 ("The effect of a judicial record of a sister state is the *same* in this state as in the state where it was made . . .") (emphasis added).[3] The Full Faith and Credit clause requires the courts of each state to accord the same degree of finality to the judgment that it would be given by the court that issued the judgment. *Thoring v. LaCounte*, 225 Mont. 77, 733 P.2d 340 (1987); *see also Underwriters Assur. v. North Carolina*

---

[3]This constitutional protection is also codified by 28 U.S.C. §1738 (1948), which requires that: "Acts, records, and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

Life, 455 U.S. 691, 71 L. Ed. 2d 558, 570, 102 S. Ct. 1357 (1982) ("[I]n order to fulfill this constitutional mandate, 'the judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced.'"). As the United States Supreme Court has noted, the Full Faith and Credit clause promotes the public policy of putting an end to litigation. *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525-26, 51 S. Ct. 517, 75 L. Ed. 1244 (1931).

The law of the state in which the original judgment was rendered determines whether a judgment is final, as well as the issues decided by the judgment. *Thoring*, 733 P.2d at 342. Under Washington law, a dismissal pursuant to an agreement between the parties constitutes a final judgment on the merits. *Shepherd v. Continental Bank*, 28 Wn. App. 346, 622 P.2d 1310, *rev. denied*, 95 Wn.2d 1019 (1981). This is consistent with the view of the Montana courts regarding settlements. *See Schillinger v. Brewer*, 215 Mont. 333, 697 P.2d 919 (1985) (judgment by stipulation is accorded the same finality as any judgment or verdict). Thus, this Court must afford the Final Judgment the same preclusive effect that it would be given by a Washington court.

2. Mr. Lynn Is Precluded From Relitigating the Question of Whether the Washington Court Had Personal Jurisdiction Over Montana Homestead Bond Purchasers.

a. Jurisdictional Determinations Are Entitled to Full Faith and Credit if the Issue Was Litigated Before the Court Issuing the Judgment.

Despite having opted out of the Washington settlement class, Mr. Lynn, through his counsel, voluntarily appeared before the Washington court and filed papers objecting to the Washington court's exercising personal jurisdiction over Montana purchasers of Homestead Bonds. In fact, Mr. Lynn's counsel filed a motion before the Washington court seeking dismissal of the claims asserted in that case on behalf of the Montana purchasers on the ground that the Washington court lacked jurisdiction over those people. *See* Jurisdiction Motion (Hall Affid. Tab 248). The Washington court rejected Mr. Lynn's arguments and held that it could constitutionally exercise personal jurisdiction over nonresident Homestead Bond purchasers for the purpose of binding them to the Final Judgment. *See* Jurisdiction Order (Supp. Hall Affid. Ex. A). Having litigated and lost that issue, Mr. Lynn seeks to relitigate it here. The Full Faith and Credit clause of the United States Consitution precludes such abusive forum shopping.

The strictures of the Full Faith and Credit clause extend to a court's decision regarding its own jurisdiction. The United States Supreme Court expressly recognized this principle more than 30 years ago in *Durfee v. Duke*, 375 U.S. 106, 11 L. Ed. 2d 186, 84 S. Ct. 242 (1963). In *Durfee*, one party sued in Nebraska to quiet title to land located on the Missouri River, which divided

the states of Missouri and Nebraska. The defendant in the Nebraska case challenged the jurisdiction of the Nebraska court, alleging that the land was actually located in Missouri, and had only been moved to the other side due to a shift in the river's course. The Nebraska court made a finding of fact that led it to conclude that the land was located in Nebraska, and presided over the action. *Durfee*, 375 U.S. at 108.

After the Nebraska court entered a judgment in favor of the plaintiff, the defendant filed an action in Missouri to quiet title in the same land. The Missouri court of appeals permitted the second action to proceed by accepting the contention that the Full Faith and Credit clause applies only when the original court has *jurisdiction* over the persons and subject matter involved in the original action. Because the Missouri court found that the Nebraska court did not have jurisdiction, it held the Missouri trial court could revisit the merits of the lawsuit.

The United States Supreme Court decided that jurisdiction issues should only have to be litigated and decided once. The Court held that a court must conduct a very limited inquiry in considering a challenge to the jurisdiction of a court which has previously issued a judgment:

> While it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions have carefully delineated the scope of such an inquiry. From these decisions there merges the general rule that *a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been*

> *fully and fairly litigated and finally decided in the court which rendered the original judgment.*

Durfee, 375 U.S. at 111 (emphasis added). The *Durfee* holding reiterated the Court's holding in *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938), in which the Court stated:

> After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

Thus, the Full Faith and Credit clause requires Mr. Lynn to abide by the Washington court's decision that it had jurisdiction over the absent class members. Public policy, according to the United States Supreme Court:

> dictates that there be an end to litigation; *that those who have contested an issue shall be bound by the result of the contest*, and that matters once tried shall be considered forever settled as between the parties. *We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard*, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.

Durfee, 375 U.S. at 111-12 (emphasis added) (*quoting Baldwin*, 283 U.S. at 525-26). In other words, Mr. Lynn gets only one opportunity to litigate his objections—he cannot keep trying different forums until he gets a result he likes.

This outcome is particularly appropriate in a class action context. The United States Supreme Court has unequivocally ruled that a *state court* may exercise juris-

diction over absent, non-resident plaintiff class members' by providing them with "minimal" due process protections. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 790 (1985). This result can arise even if the absent class members are not given an opportunity to opt out of the settlement. *See Nottingham Partners v. TransLux Corp.*, 925 F.2d 29, 32-33 (1st Cir. 1991). In *Nottingham Partners*, an absent class member appeared and objected to the terms of a settlement in a Delaware state court class action. *Id.* The class member vigorously objected to being included in the class and to being denied the opportunity to "opt out." Those objects were rejected by the Delaware court. The class member then attempted to pursue its damages claims in a previously-commenced lawsuit before the federal district court in Massachusetts. On the settling defendants' summary judgment motion, the Massachusetts federal district court dismissed the class member's claims because they were precluded by the judgment on the class action settlement. In affirming this result, the First Circuit recognized the precise principle which applies to Mr. Lynn:

> appellants attempt . . . to have us review the propriety of the class certification and their inclusion in the class. . . . The short of it is that *we must give full faith and credit to what the Delaware courts have lawfully found and ordered.*

Nottingham Partners, 925 F.2d at 32 (emphasis added; citations omitted).

Because Mr. Lynn, like the objecting plaintiff in *Nottingham Partners*, was "given, and vigorously exercised, a constitutionally adequate opportunity to be heard," Mr. Lynn is bound by the result in the Washington court. Mr. Lynn had had his day in court; he is not entitled to another one.

b. Mr. Lynn Litigated and Lost His Jurisdiction Objections Before the Washington Court and is Bound By the Result.

Under *Durfee*, this Court must inquire *only* as to whether the Washington court's personal jurisdiction over absent class members was litigated in the Washington action. To make that determination, the Court need look no further than the Jurisdiction Order:

> **counsel for Mr. Lynn and their clients have had a full and fair opportunity to raise their objections** to (a) the form of the Class Notice, (b) the adequacy of the class representatives in this case with respect to Montana purchasers of Homestead Bonds, and **(c) this Court's personal jurisdiction over the absent class members.**

Jurisdiction Order (Supp. Hall Dec. Ex. A) at 4 (emphasis added). The record before this Court also reflects that counsel for Mr. Lynn and their clients submitted evidence and legal memoranda and that counsel for Mr. Lynn personally appeared before the Washington court on three separate occasions. *See, e.g.*, Hall Affid. Tabs 233, 234, 235, 240, 241, 248, 249, 258 (documents submitted to the Washington court by counsel for Mr. Lynn); Juris. Order (Supp. Hall Affid. Ex. A) at 4-5.

By comparing the papers recently submitted to this Court to those filed by Mr. Lynn's counsel in connection with the Jurisdiction Motion the Washington court, the Court can see that the arguments here are the same objections that were made to (and rejected by) the Washington court.

Argument	Washington Filing	Montana Filing
Montana purchasers not bound due to "blanket opt out" filed by Lynn	Jurisdiction Motion at 5-6	Opp. to Motion to Vacate at 9-10
No personal jurisdiction over Montana Investors	Jurisdiction Motion at 6-20	Class Cert. Brief at 15-16 Opp. to Motion to Vacate at 8-24
Class Notice Insufficient	Jurisdiction Motion at 9-12	Class Cert. Brief at 16 Opp. to Motion to Vacate at 10-14
Opt Out/Claim Submission Process Too Onerous	Jurisdiction Motion at 13-19	Class Cert. Brief at 16 Opp. to Motion to Vacate at 20
Montana Investors Not Adequately Represented	Jurisdiction Motion at 13-19	Class. Cert. Brief at 16 Opp. to Motion to Vacate at 20
Montana Law Better Than Washington Law	Jurisdiction Motion at 14-17	Class Cert. Brief at 16 Opp. to Motion to Vacate at 20-24

In short, Mr. Lynn is simply raising before this Court the same objections he raised in his papers submitted to the Washington court.

As is demonstrated by the Final Judgment, the Washington court expressly rejected every one of Mr. Lynn's objections. In summary, the court made the following findings:

- "The Notice properly informed persons in the Class of their rights under the Settlement, including, without limitation, the right to opt out and pursue individual actions, and the consequences of failing to opt out."
- The Notice "constituted valid, due, and sufficient notice to members of the Class, complying fully with due process and Rule 23. . . ."
- "Both in the litigation and the settlement negotiations, the Class Representatives adequately represented all persons in the Class, including, without limitation, Montana Homestead Bond purchasers."
- "The Court has jurisdiction over the subject matter of this litigation and has personal jurisdiction over all parties to this litigation, including all Class Members."
- "In light of the benefits and detriments to persons in the class under [Montana and Washington] law, the Court finds that the settlement is fair, reasonable and adequate to all members of the Class, including, without limitation, Montana Homestead Bond purchasers."

Final Judgment (Supp. Hall Affid. Ex. B) at 2-3; *see also* Jurisdiction Order (Supp. Hall Affid. Ex. A); Opt Out Order (Hall Affid. Tab 257). Because the record before this Court unquestionably demonstrates that Mr. Lynn

had a full and fair opportunity to litigate his objections, this Court need go no further to rule that Mr. Lynn is bound by the Washington court's determination of jurisdiction.

Counsel for Mr. Lynn argue strenuously that an absent class member *must* be entitled to attack a class action settlement in "his home forum." *See* Class Cert. Brief at 18 (citing *In re Real Estate Title and Settlement Services Antitrust Litig.*, 869 F.2d 760 (3d Cir. 1980)); *see also* Opp. to Motion to Vacate at 7-8. This argument is both wrong and unsupported by the case cited by Mr. Lynn's counsel.

In *Real Estate Title*, the "sole issue" addressed by the court was whether absent class members could properly be *enjoined* from pursuing an individual action for damages when the class members both (a) lacked minimum contacts with the forum issuing the injunction and (b) *had not previously been given an opportunity to opt out of the class. Id.* at 769. This class in *Real Estate Title* had been certified under Rules 23(b)(1) and (b)(2), and the trial court denied the motion of the objecting absent class members to opt out of the class action settlement. The absent class members did *not* raise their jurisdictonal attack (inadequate representation) in their motion to opt out. *Real Estate Title*, 869 F.2d at 763 (school boards "did not participate in the objections to adequacy of representation.").

The Third Circuit held that, under these circumstances, the federal district court could not enjoin the school boards from litigating their adequacy of representation claims in a collateral attack in a forum *other* than the court issuing the judgment. The court specifically limited its holding to injunctions against individual suits when the court issuing the judgment *had not given the class*

members an opportunity to opt out in the class certification process. Id. at 769.

Mr. Lynn, of course, is *not* faced with that situation. Pursuant to Rule 23(b)(3), Mr. Lynn, and all the other persons in the Washington settlement class, were given a constitutionally sufficient notice of their opportunity to opt out and pursue individual actions. Final Judgment (Supp. Hall Affid. Ex. B) at 3. Under these circumstances, even the *Real Estate Title* court recognized that absent class members in Rule 23(b)(3) damages actions could be bound by a judgment, whether or not they had "minimum contacts" with the class action forum. *Id.* at 762. According to the *Real Estate Title* court:

> *Shutts* stands for the proposition that a court can bind *all members* of a plaintiff "opt out" class to a judgment for damages even if the class members do not meet the traditional requirements of *in personam* jurisdiction "so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest."

Real Estate Title, 869 F.2d at 766 (emphasis added).

Mr. Lynn has already litigated his claim of inadequate representation before the Washington court, as he expressly raised it in his motion to dismiss for lack of jurisdiction. Jurisdiction Motion (Hall Affid. Tab 248) at 13-19. For the reasons stated above, the Full Faith and Credit clause precludes Mr. Lynn from relitigating that issue in this court.

Mr. Lynn appears to have confused himself with a member of the Washington settlement class who neither filed a claim nor opted out. It is true that a member of the Washington settlement class who *had not litigated the jurisdiction issue* could have collaterally attacked the

Washington court's jurisdiction. *Hansberry v. Lee*, 311 U.S. 32, 45 (1940). Having voluntarily appeared and contested the jurisdiction issue, however, *Mr. Lynn* is "bound by the result of the contest." *Durfee*, 375 U.S. at 111. *If* a member of the Washington settlement class ever challenges jurisdiction, they will have to prove "not only that the prior representative 'failed to prosecute or defend the action with due diligence and reasonable prudence,' but also that 'the opposing party was on notice of facts making that failure apparent.'" *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390-91 (9th Cir. 1992). This Court need not decide such a challenge on Mr. Lynn's motion, however, as he had already litigated his objections in Washington.[4]

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[4]The Montana purchasers who submitted claims in the Washington action voluntarily submitted themselves to the jurisdiction of the Washington court. Each Proof of Claim and Release form provides:

> I also submit to the jurisdiction of the Superior Court of the State of Washington for King County (the "Court") with respect to my claim as a Class Member and for purposes of enforcing the release set forth herein.

Proof of Claim at 6. A copy of the Proof of Claim form is attached to the Affidavit of Tim J. Filer in Opposition to Plaintiffs' Motion for Class Certification ("Filer Affid.") as Exhibit A. Given this express submission to the Washington court's jurisdiction, the Montana purchasers who filed claims must be deemed to have waived any objection to that jurisdiction. *Shutts*, 472 U.S. at 812 ("Any plaintiff may consent to jurisdiction.") (*citing Keeton v. Hustler Magazine, Inc.*, 465 U.S. 470, 79 L. Ed. 2d 790, 104 S. Ct. 1473 (1984)). Counsel for Mr. Lynn admitted as much at the hearing on the Jurisdiction Motion in the Washington action. December 2, 1994 Hearing Transcript (Hall Affid. Ex. C) at 37:21-41:12.

3. Mr. Lynn Is Barred From Raising Jurisdictional Challenges by the Doctrines of Collateral Estoppel, Laches, and Equitable Estoppel.

There are two additional reasons for precluding Mr. Lynn from relitigating his jurisdiction objections.

First, under Washington law (which is the law this Court must apply to determine the preclusive effect of the Final Judgment), Mr. Lynn is collaterally estopped from challenging the Washington court's jurisdiction over the absent class members. Mr. Lynn's appearance through counsel and participation in the Washington action are sufficient to bind him to that court's resolution of his objections. *See Lejeune v. Clallam County*, 64 Wn. App. 257, 267, 823 P.2d 1144 (1994) (judgment precludes relitigation of claims of a person "who appears and participates in the proceeding, . . . or 'one whose interests are properly placed before the court.'"); *see also Nottingham Partners*, 925 F.2d at 32 (person who objects to class action settlement before the court approving the settlement is barred by collateral estoppel from relitigating same objections in another court).

Second, Mr. Lynn is bound by the Washington court's determination that he was barred from objecting to jurisdiction because his unreasonable delay in asserting the objections would unfairly prejudice the settling parties:

> In light of the passage of time and the expenditures of funds from the settlement funds for mailing and publishing notice of the settlement to the class and the expenditure of resources by the parties, [Mr. Lynn's] delay in asserting these objections was not reasonable and could result in unfair prejudice to the parties to this case.

* * *

> Finally, Mr. Lynn, individually, is barred from raising these objections under the doctrines of laches and equitable estoppel.

Jurisdiction Order (Supp. Hall Affid. Ex. A) at 4-5.

For these additional reasons, Mr. Lynn's objections to the Final Judgment should be rejected. Mr. Lynn is bound by the Washington court's determination that it had jurisdiction to bind the absent class numbers to a judgment dismissing their claims. Because that determination eliminates the class Mr. Lynn seeks to represent, his motion for class certification must be denied.

4. The Washington Judgment Is Entitled to Res Judicata Effect in Montana.

Mr. Lynn's counsel argues in the alternative that the Final Judgment should not be afforded res judicata effect in Montana *even if* the Washington court had personal jurisdiction over the absent class members. *See* Opp. to Motion to Vacate at 24-28. Each of the arguments advanced on this issue misses the point.

a. The Washington Court Expressly Ruled That Lynn Would Be Bound By Its Judgment In The Montana Proceeding.

On two separate occasions, the Washington court expressly rejected Lynn's jurisdictional arguments, holding that it had jurisdiction over all absent bond purchasers who had not opted out, and thus could dismiss their claims through final judgment. Mr. Lynn's counsel mischaracterizes the transcript of the Washington proceedings in an attempt to negate the clear mandate of the Washington court's Final Judgment. Contrary to plaintiffs' contentions, Judge Scott did not reserve judg-

ment concerning his jurisdiction over the Montana purchasers. In his Jurisdiction Order, Judge Scott expressly stated: "The Court rules that it has personal jurisdiction over the absent class members in this case, including the Montana purchasers of Homestead Bonds." Jurisdiction Order (Supp. Hall Affid. Ex. A) at 6. The transcript snippets quoted in plaintiff's brief constitute nothing more than the Washington court's acknowledgment that absent class members (not Mr. Lynn) may assert a collateral attack on the Final Judgment.

No absent Montana Bond purchaser has challenged Judge Scott's jurisdictional findings. Rather, Mr. Lynn brought the motion for class certification presently before this Court. Mr. Lynn is bound by the Washington court's jurisdictional determination. Consequently, the claims of the Montana purchasers who did not opt out of the Washington action cannot be included in the putative class before this Court for certification.

b. The Washington Court Necessarily Decided That It Had Personal Jurisdiction Over Absent Montana Bond Purchasers.

Mr. Lynn's characterization of the Washington Court's jurisdiction ruling as "in the alternative," is equally incorrect. Although Judge Scott concluded that Mr. Lynn did not have standing to challenge the court's jurisdiction over Montana purchasers who did not opt out or file claims in the action, he went on (as he had been urged to do by Mr. Lynn's counsel) to address the merits of Mr. Lynn's objections to the exercise of jurisdiction over the absent Montana purchasers. Judge Scott's Final Judgment dismissing the claims of Montana class members was based upon his finding that personal jurisdiction existed–

without such a determination the Final Judgment *could not have been entered.*

Plaintiff's Opp. to Motion to Vacate cites both case law and commentary for the proposition that preclusive effect should not be accorded alternative holdings. This argument, however, ignores plain wording of the Jurisdiction Order: "However, because counsel for Mr. Lynn have raised questions concerning this Court's jurisdiction, the Court has considered the merits of the Jurisdiction Motion. The Court rules that it has personal jurisdiction over the absent class members in this case, including the Montana purchasers of Homestead Bonds." Jurisdiction Order (Supp. Hall. Affid. Ex. A) at 6.

Mr. Lynn's citation of the Restatement is also misdirected. Restatement (Second) of Judgments, §27, comment i, states: "If a judgment of a court of first instance is based on determination of two issues, *either of which standing independently would be sufficient to support the result*, the judgment is not conclusive with respect to either issue standing alone." (emphasis added). In order to dismiss the claims of all Homestead Bond purchasers—whether residing in Washington or other states—Judge Scott had to determine whether the notice given the absent members of the Washington class satisfied CR 23 and due process, thus giving the Washington Court personal jurisdiction over them. After extensive briefing and argument on those issues, the Washington Court concluded that it had personal jurisdiction. *Only after making* such a finding could the Washington Court dismiss the claims of the absent class members—including Montana purchasers—who did not opt out. Judge Scott's entry of the Final Judgment could not have been based on his finding Mr. Lynn lacked standing to challenge the court's jurisdiction. Consequently, those two conclusions

do not constitute "alternative" holdings with regard to the doctrine of *res judicata*. The issue was fully litigated, decided, and necessary to the court's final judgment, and consequently should be accorded full *res judicata* effect.

c. The Final Judgment Does Not Violate Montana Public Policy.

Plaintiffs' public policy arguments are equally unavailing. The case law cited by Mr. Lynn for the proposition that *res judicata* should not be allowed to negate the claims of Montana Bond purchasers does not support that proposition. Rather, both the Montana Constitution and the case law interpreting it support the unspectacular notion that individuals should not be unjustly prohibited from vindicating and protecting their rights. The Washington class action afforded the Montana Bond purchasers a sufficient opportunity to do just that—the same opportunity absent class members would be afforded in a Montana class action under M. R. Civ. P. 23(b)(3)—and thus does not violate the public policy of the state of Montana.

Montana and Washington, like many other states, have adopted a class action rule nearly identical to Fed. R. Civ. P. 23. *See* M. R. Civ. P. 23. Consequently, the means of recovery provided by Washington's CR 23(b)(3) is consistent with Montana's public policy favoring recovery by members of an injured class. As stated by the Montana Supreme Court in *In re Anderson's Estate*, 121 Mont. 515, 524, 194 P.2d 621 (1948) (a case cited by plaintiffs): "Unless the public policy of the state would prevent the recognition of the decree or such recognition would be injurious to the best interests of the state *we must recognize the force and effect of the decrees of our sister states . . .*" *Id.* at 626 (emphasis added). The pro-

cedures followed in dismissing the claims of purchasers who did not opt out were not only *consistent* with Montana public policy they were identical to the procedures that would have been employed by a Montana court.

Montana and Washington have chosen to protect the interests of those within their jurisdiction by identical means. Thus, the Montana purchasers have been afforded the same opportunity to protect their interests in the Washington action as they could have under Montana law. This hardly constitutes the outright denial of redress complained of in Mr. Lynn's brief.[5] Furthermore, plaintiff has failed to cite a single case in which the court employs the public policy exception to deny full faith and credit the judgment of a sister state's court.[6]

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[5]The cases cited in plaintiffs' brief demonstrate instances in which the Montana courts have concluded that *Montana* statutes unjustifiably abridge the rights of those governed thereby to recover for their injuries caused by others. In *White v. State*, 203 Mont. 363, 661 P.2d 1272 (1985), cited in Plaintiffs' Brief at 27, the Montana Supreme Court struck down a Montana statute establishing governmental tort immunity. In *Corrigan v. Janney*, 192 Mont. 99, 626 P.2d 838 (1981), cited in Plaintiffs' Brief at 27, the court struck down a statute precluding a tenant from recovering certain tort damages from their landlord for his failure to repair the leased property. The public policy exception is intended to prevent unjustified wholesale limitations on recovery, rather than individual instances where plaintiffs complain about an unfavorable judgment. Montana's class action procedure, like Washington's, provides a sufficient means of recovery to a group of similarly situated plaintiffs. Since the Washington statute provides essentially the same mechanism for obtaining redress, it does not contravene Montana public policy.

[6]Plaintiffs' Brief repeatedly recites that "Montana residents have a fundamental right to full legal redress for any injuries they suffer." Plaintiffs' Brief at 27. While this rule is intended to prevent the legislature from denying individuals their fundamental rights through clearinghouse damage recovery exclusions, plaintiff would have this Court believe that this right is violated whenever a court enters a judgment unfavorable to a plaintiff.

Accordingly, Mr. Lynn, who raised and argued this very issue before the Washington Court, may not raise it in the present action.

B. The Washington Court Properly Exercised Personal Jurisdiction Over the Absent Class Members, Including Montana Homestead Bond Purchasers.

Without waiving their contention that this Court need not and should not consider Mr. Lynn's objections to the Washington court's exercise of personal jurisdiction, Murphey Favre and the Individual Defendants respond to them below. Like the Washington court, this Court will see that the Washington court's procedures fully complied with both Rule 23 and the dictates of constitutional due process.

If this Court, despite the mandate of *Durfee*, considers Mr. Lynn's objections, the Court should rule that the Washington court constitutionally exercised jurisdiction over the absent class members. Mr. Lynn's counsel admit that the due process standards for exercising personal jurisdiction over absent class members are set forth in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 790 (1985). Like the Washington action, *Shutts* involved a class action in which the absent members of the plaintiff class resided in multiple states. *Id.* at 816 n.6 (listing residence states of absent plaintiffs). Under *Shutts*, the forum state (Washington), in order to bind an absent class member to a judgment for money damages, must only "provide minimal due process protection." *Id.* at 812. This protection is limited to giving absent class members (a) a notice describing the action and the plaintiffs' rights in it, (b) an opportunity to appear and participate in the litigation, (c) an opportunity to opt out and (d) adequate represen-

tation. *Id.* The Washington court afforded each of these protections, and, therefore may bind the absent class members whether or not they filed claims. *See Silber v. Mabon*, 18 F.3d 1449, 1451 (9th Cir. 1994). In other words, once these steps are taken, absent class members may be constitutionally bound by the judgment and the release of their claims on the basis of "implied consent to jurisdiction when a class member fails to opt out of the class." *Id.*

Murphey Favre and the Individual Defendants respond to each of Mr. Lynn's contentions below.

1. Neither Mr. Lynn Nor His Counsel Had Authority to Exclude Absent Class Members From the Washington Settlement Class.

Counsel for Mr. Lynn contend that they effectively excluded the Montana Homestead Bond purchasers from the Washington settlement class by filing a "blanket opt out" request with the company administering the Washington settlement. *See* Opp. to Motion to Vacate at 9-10. The Washington court expressly rejected this argument and ordered the claims administrator to "disregard and give no effect to the October 7, 1994 letter from Mr. Donald Snavely which purports to exclude unnamed Montana purchasers of Homestead Bonds from the settlement class previously certified in this case." Opt Out Order (Hall Affid. Tab 257) at 3.

Mr. Lynn cites to this Court the same cases that were cited to the Washington court in support of his argument that Mr. Lynn was authorized, as a putative class representative, to act on behalf of the absent class members. The cases cited by Mr. Lynn's counsel on this point do not support this extraordinary proposition. The first

case says nothing about a class representative's authority to act on behalf of the class in a *different* lawsuit. *Roper v. Consurve, Inc.*, 578 F.2d 1106 (5th Cir. 1978). In that case, the trial court denied class certification and the defendant then offered full payment of the class representative's claim. The Fifth Circuit ruled that the offer did not render the class representative's claim moot and that he could appeal the order denying class certification.

Mr. Lynn's second case is also of no help to his position. In that case, the court held that the Maryland Attorney General was authorized, under provisions of the Maryland state constitution and Maryland statutes, to request exclusion from a class settlement on behalf of certain political subdivisions of the state of Maryland. *In re Armored Car Antitrust Litig.*, 645 F.2d 488, 493 (5th Cir. 1981). The Attorney General's authority to opt out had *nothing* to do with the authority granted a putative class representative under Rule 23. *Id.* Indeed, the court specifically held that a class representative may not act on behalf of persons who have not authorized him to do so:

> The notice and opt-out procedures of Rule 23(c)(2) were aimed at protecting parties from being bound to judgment *without having authorized* the class representative to act on their behalf.

Id. (emphasis added; citation omitted). As a leading commentator on class action litigation, one recognized as generally to take positions advantageous to plaintiffs, has noted, "the decision to exercise the right of exclusion in a Rule 23(b)(3) action is an *individual decision* of each class member and *may not be usurped by the class representative or class counsel.*" 3 *Newberg on Class Actions* § 16.16 (3d ed. 1992) (emphasis added).

Thus, Mr. Lynn's purported "blanket opt out" was, as the Washington court determined, entitled to "no effect" and cannot serve as a basis for finding that Montana Homestead Bond purchasers were not included in the Washington settlement class.

2. The Class Notice Satisfies the Requirements of Rule 23 and the Due Process Clause.

Mr. Lynn's counsel contend that the notice sent to the persons in the Washington settlement class describing the settlement and their rights under it was defective for a variety of reasons. *See* Opp. to Motion to Vacate at 10-16. As noted above, Mr. Lynn raised each of these arguments before the Washington court. The Washington court expressly rejected them, holding:

> The Notice properly informed persons in the Class of their rights under the Settlement, including, without limitation, the right to opt out and pursue individual actions, and the consequences of failing to opt out. . . . [The Notice] constituted valid, due, and sufficient notice to members of the Class, complying fully with due process and Rule 23.

Final Judgment (Supp. Hall Affid. Ex. B) at 2.

Under both Washington's and Montana's Rule 23, the notice in a Rule 23(b)(3) action must provide certain information:

> The notice shall advise each member of the class that (A) the court will exclude him from the class if he so requests by a specified date; (B) *the judgment*, whether favorable or not, *will include all members who do not request exclusion*; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

Washington Civil Rule 23(c)(2) (emphasis added). In the context of Rule 23(b)(3) class actions for damages, "[t]he procedural protections of [Rule] 23 replace the rigid rules of personal jurisdiction in this context and **are all that is needed to meet the requirements of due process.**" *Real Estate Title*, 869 F.2d at 766 (emphasis added; citing *Shutts*).

The Class Notice provides all of the information required by Rule 23. *See* Hall Affid. Ex. E. The Class Notice has an entire section entitled **"RIGHTS OF CLASS MEMBERS AND PROCEDURES FOR FILING PROOFS OF CLAIM AND FOR EXCLUSION FROM CLASS."** *Id.* The Class Notice carefully explains at page 4 the consequences of failing to request exclusion from the class:

> 4. If you do not request to be excluded from the Class, *you will be bound by any and all determinations or judgments in the litigation* whether or not concerning the Settlement entered or approved by the Court, whether favorable or unfavorable to the Class and *whether or not you submit a Proof of Claim and Release.*

Id. (emphasis added). This message is reinforced in bold-faced, all capital letters at page 5 of the Notice. *Id.* The other information required by CR 23(c)(2) is also set forth in the Class Notice. *Id.* at ¶V(B) (class members may appear personally or by counsel and may object to the settlement) and ¶VI(C)(5), (7) (same). In short, the Class Notice fully satisfies the requirements of CR 23 *and* due process.

The Class Notice also provides an appropriate basis for this Court to exercise personal jurisdiction over absent class members because it meets all of the requirements of the Due Process Clause of the Fourteenth Amendment of

the U.S. Constitution. According to the United States Supreme Court, in order to bind absent, non-resident plaintiffs to a class action judgment in a class action for money damages, a state court must:

> provide *minimal* due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel.

Shutts, 472 U.S. at 812 (emphasis added).[7]

The Supreme Court also gave explicit directions concerning what the notice must contain to satisfy this "minimal due process" standard:

> The notice should *describe the action* and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff *be provided with an opportunity to remove himself from the class* by executing an "opt out" or "request for exclusion" form to the court.

Id. (emphasis added). Once these steps are taken, absent class members may be constitutionally bound by the judgment on the basis of "implied consent to jurisdiction when a class member fails to opt out of the class." *Silber*, 18 F.3d at 1454.

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[7] As the Supreme Court noted, the "notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Shutts*, 472 U.S. at 812. Subsequent decisions have made it clear that *Shutts* does not require actual receipt of the notice, so long as the efforts to provide notice were the best practicable under the circumstances. *Silber*, 18 F.3d at 1451 (because notice efforts were "best practicable," due process rights not violated when absent class member was denied right to opt out even though he did not acutally receive the notice until after the opt out deadline had passed). There is no challenge to the procedures by which the parties provided notice to the class.

As noted above, the Class Notice provides each of the disclosures required by *Shutts* and, therefore, satisfies the "minimal due process" requirements necessary for the Washington court to exercise personal jurisdiction over the absent plaintiffs and bind them to the Final Judgment.

3. Lynn's Technical Objections to the Form of the Class Notice Do Not Render It Constitutionally Defective.

Mr. Lynn's counsel have raised essentially two objections to the form of the Class Notice. First, they argue that the Class Notice should have informed absent class members of the pendency of the putative class action in Montana and compared Washington law to Montana law. Second, Montana Counsel argue that the "opt out" and proof of claim provisions in the Class Notice are too onerous. Once again, the Washington court has already rejected these arguments as being without merit. *See* Jurisdiction Order (Supp. Hall Affid. Ex. A); Final Judgment (Supp. Hall Affid. Ex. B). This Court should also reject these arguments.

a. Due Process Does Not Require Disclosure of Other Pending Actions or Comparative Law Analyses to Be Included in the Class Notice.

Mr. Lynn's counsel argue that the Class Notice should have disclosed the pendency of this action. This argument is flatly contrary to the mandate of *Shutts*, which requires that the notice "should *describe the action* and the plaintiffs' rights in it." *Shutts*, 472 U.S. at 812 (emphasis added). Lynn's contention that the pendency of a parallel class action was required to be disclosed in the Class Notice has been rejected by the courts. *See, e.g., In re*

Corrugated Container Antitrust Litig., 643 F.2d 194, 223-24 (5th Cir. 1981) (notice approved without discussion of claims in parallel state court action); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 160-61 (S.D. Ohio 1992) ("notice need not include information about a parallel proceeding in a state court."). Lynn's cases on this point approve notices containing information about other pending cases, but they do *not* stand for the proposition that such information *must* be included in the notice in order to comply with Rule 23 and provide due process. *See Mars Steel v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 683 (7th Cir. 1987) (description of parallel case not so "seriously misleading" as to invalidate approval of the settlement); *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982) (disclosure that participation in the settlement would preclude participation in another pending case); *Roberts v. Heim*, 130 F.R.D. 416, 422 (N.D. Cal. 1988) (disclosure of pending tax court cases necessary because class members would be taking positions inconsistent with positions they would advance in tax court proceedings). At most, the decision of whether to include a discussion of another pending case in the class settlement notice is an issue left to the Court's discretion under Rules 23(d), (e). *In re Corrugated Container Antitrust Litig.*, 643 F.2d at 223 (content of notice is an issue within the trial court's discretion).

Likewise, Lynn's counsel's argument that the Class Notice needed to set out a comparison of Washington and Montana law before it could satisfy due process is simply wrong. If Lynn's counsel had been permitted to present in the Class Notice their views as to why Montana law is more favorable to Montana purchasers, the Washington court would have been "bound to allow the proponents to respond" by describing their views as to

why the settlement was a fair one. *In re Corrugated Container Antitrust Litig.*, 643 F.2d at 224. Such a procedure "would have made the notice's neutrality difficult to maintain and may have become so detailed that the notice would 'confuse class members and impermissibly encumber their rights to benefit from the action.'" *Id.* (quoting *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1975).[8]

Thus, Rule 23 and due process under the *Shutts* rule and due process require only that class members be advised of their rights to exclude themselves from the settlement. If the class members wish additional information, they are free to consult counsel of their own choosing. *See Shutts*, 472 U.S. at 813 (if a "plaintiff's claim is sufficiently large or important that he wishes to litigate it on his own, he will likely have retained an attorney or have thought about filing suit, and should be fully capable of exercising his right to 'opt out'"). As one case cited by Lynn's counsel recognizes, when the overwhelming portion of the class members have chosen *not* to opt out of the settlement, the presumption is that they have made an informed decision to accept the results of the settlement. *See In re Baldwin United Corp.*, 607 F. Supp. 1312, 1325 (S.D.N.Y. 1985).

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[8] Lynn's counsel cites *Nissan Motor Corp.* for the proposition that the Class Notice should have disclosed the Montana action. It does not stand for that proposition. In *Nissan Motor Corp.*, the notice sent to class members informing them of the action and of their right to opt out did not include information about a proposed settlement with one class of defendants. *Id.* at 1104. The court found this information was "material" to the decision of whether to opt out. *Id.* Nothing in that case supports the proposition that a class notice needs to discuss parallel actions or give comparative law analyses.

The sole case cited by Lynn's counsel requiring disclosure concerning applicable law does not apply in this case. *Sarafin v. Sears, Roebuck & Co.*, 73 F.R.D. 585 (N.D. Ill. 1977). In *Sarafin*, the court merely held that the settlement notice had to inform class members that the federal Truth-in-Lending Act imposed a limitation on class action recoveries and that individual lawsuits were not subject to that limitation. *Id.*

Finally, Mr. Lynn's counsel argues without authority that the Class Notice should have indicated that participation in the Washington settlement was "likely" to lead to a smaller recovery than in the Montana case. Even assuming this is true (defendants do not concede this point), this is an issue going to the fairness of the settlement and not to the adequacy of the Class Notice. *See* Jurisdiction Order (Supp. Hall Affid. Ex. A) at 6 (court will consider "comparisons of applicable state law which could govern the class members' claims as part of the overall determination of the fairness of the settlement."); *see also In re Baldwin United Corp.*, 607 F. Supp. at 1323 (comparing state and federal law claims in settlement approval analysis).[9]

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[9] Lynn's counsel vaguely complains that the Class Notice does not inform class members of the extent of their recovery. Opp. to Motion to Vacate at 13-14. Lynn's counsel's own cases recognize, however that "very general descriptions of the proposed settlement" are sufficient. *Weinberger*, 698 F.2d at 70; *Cosgrove v. First Merchants Nat'l Bank*, 68 F.R.D. 555, 561 (E.D. Va. 1975) (notice should disclose "average figures *or* rates of recovery on an individual scale."). The Washington Class Notice, like the notice in *Weinberger*, disclosed the maximum amount of attorney fees that would be awarded. Class Notice (Hall Affid. Ex. E) at ¶V.A. With this information, class members could calculate their potential recovery, using their unique purchase and sale information, by applying the formula set out in the Class Notice. Nothing further is required by Rule 23 or due process.

Due process requires class members to be advised of their rights under a proposed class action settlement *and* of their right to exclude themselves from such a settlement. The Class Notice in this case notifies class members of these rights. The additional requirement proposed by Mr. Lynn's counsel would require disclosure of legal issues to laypersons that are being vigorously contested by the parties in this case. Providing laypersons with this information in a class notice would likely cause more confusion than it would resolve.

b. The Opt Out Procedures in the Class Notice Comply With Due Process.

Mr. Lynn's counsel also argues that the opt out procedures in the Class Notice are so onerous that they violate due process. This objection also fails under *Shutts*.

As the Supreme Court held in *Shutts*, it would be a "rare species of class member who is unwilling to execute an 'opt out' form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so." *Shutts*, 472 U.S. at 813. The information requested in the opt out procedure is hardly onerous—name, address and purchase and sale activity with regard to Homestead Bonds. Indeed, the opt out information is less detailed than the information necessary to file a claim. Moreover, the information requested is critical to determining whether or not the person requesting exclusion from the class was a class member or has authority to request exclusion on behalf of a class member.

Thus, while the opt out procedure asks for slightly more detail than the "postcard" approach advocated by Lynn's counsel, there are good reasons for requesting

the information. According to the Supreme Court, "[t]he interests of the absent plaintiffs are sufficiently protected by the forum State when those plaintiffs are provided with a request that can be returned within a reasonable time." *Shutts*, 472 U.S. at 814. That is exactly the procedure employed in this case, and it satisfies due process. Accordingly, Montana Counsel's objections on this point should be rejected.

Similarly, the proof of claim process used in the Washington settlement is common in class action settlements. *See* 3 *Newberg on Class Actions* §12.07 (3d. ed. 1992) (formula settlements ordinarily require class members to file a proof of claim to recover). Failure to file a claim, or the failure to file a claim by the deadline set by the court in the class notice, is a sufficient ground for denying recovery to an absent class member. *In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1127 (9th Cir. 1977) ("a cutoff date is essential and at some point the matter must be terminated."); *Fontana v. Elrod*, 826 F.2d 729, (7th Cir. 1987). Mr. Lynn's sole case on this issue holds nothing more than class members who were *required* to file a proof of claim *before* liability was established *might* not be barred from participating in a class recovery. *Korn v. Franchard Corporation*, 50 F.R.D. 57 (S.D.N.Y. 1960). Again, the proof of claim requirements lie within the court's discretion under Rules 23(d) and (e) and do not give rise to due process considerations.

Because the Class Notice satisfies all of the requirements of CR 23 and provides the "minimal due process protection" required by *Shutts*, the notice properly serves as the basis for this Court's exercise of personal jurisdiction over the absent class members, including the Montana purchasers.

4. Montana Investors Were Adequately Represented in the Washington Action.

Mr. Lynn's counsel also contend that the Montana purchasers (and presumably the purchasers from every other state other than Washington) were not adequately represented because all of the class representatives are Washington residents. Opp. to Motion to Vacate at 17-20. As Lynn's counsel is forced to concede, the class alleged in the Washington action included, from the outset, *all* purchasers of Homestead Bonds from Murphey Favre, regardless of their residence.

In determining whether the Montana Homestead Bond purchasers were adequately represented, the Court must examine the qualifications of class counsel, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992). The Washington court ruled that the class representatives "more than adequately represented all members of the class, including Montana purchasers of Homestead Bonds," and that each of the other requirements for adequate representation was satisfied. Jurisdiction Order (Supp. Hall Affid. Ex. A) at 5; Final Judgment (Supp. Hall Affid. Ex. B) at 4.

Apparently, Mr. Lynn's counsel contends that a conflict existed between the Washington class representatives and his clients for two reasons. First, his client "felt that a larger pro rata share of the settlement proceeds should be attributable to their claims." Opp. to Motion to Vacate at 19. These plaintiffs can hardly claim to have been prejudiced by this "conflict," as they have opted out and are pursuing their claims in this action. No *other* Montana purchasers of Homestead Bonds shared this feel-

ing, as no other Montana purchasers opted out or filed objections to the settlement. Hall Affid. ¶ 5.

Second, Lynn's counsel contends the Washington court considered an inaccurate summary of applicable Montana law in deciding that the Washington settlement was fair to all class members, including Montana purchasers. Opp. to Motion to Vacate at 19-24. This argument misses the point for at least two reasons.

First, the Washington court was not limited to Washington's class counsel's memorandum on Montana law in reaching its fairness determination. Mr. Lynn's counsel's views of Montana law were set forth in the record considered by the Washington court in reaching its fairness determination. Those views were stated in the Jurisdiction Motion and in a letter submitted as an exhibit by Mr. Lynn's counsel. *See* Jurisdiction Motion (Hall Affid. Tab 248) at 13-17; December 6, 1994 letter to Judge Scott (Hall Affid. Tab 258) at Ex. C (Affidavit of Donald V. Snavely, purporting to "explain why the claims of Montana purchasers are more valuable than those of Washington purchasers."). The Washington court also had the benefit of this Court's February 16, 1994 Opinion and Order on defendants' motions to dismiss and this Court's December 5, 1994 Opinion and Order vacating the stay in this case. *See* Jurisdiction Motion (Hall Affid. Tab 248) (attaching February 16 Order and Opinion); December 6, 1994 letter (Hall Affid. Tab 258) at Ex. E (December 5 Order). The mere fact that Washington class counsel *may* have interpreted Montana law differently than Mr. Lynn's counsel does not give rise to an "adequate representation" challenge when the court approving a class action settlement fully considers the issues. *Brown*, 982 F.2d at 991.

Second, even assuming Montana law is more beneficial to Montana purchasers than Washington law (defendants do not concede this), Lynn's counsel fails to identify any "antagonism" between the interests of the class members and the class representatives. The Washington class settlement treated each class member equally, providing a recovery higher than the national average for securities fraud class actions. *See* Oliver Declaration (Hall Affid. Tab 254). Lynn's counsel has also failed to identify a single step taken by Washington class counsel that did not benefit each class member equally, regardless of their state of residence. Moreover, Washington class counsel's declarations make clear that the interests of Montana purchasers were taken into consideration both in the litigation and in the settlement negotiations. *Id.*; *see also* Oliver Declaration (Hall Affid. Tab 237). In short, Washington class counsel achieved a good settlement for *all* members of the settlement class, and Mr. Lynn's counsel has advanced no good reason to question the adequacy of their representation.[10]

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[10]It is instructive to note that to succeed on a collateral attack on a class action judgment based on the adequacy of representation, an absent class member would have to demonstrate "not only that the prior representative 'failed to prosecute or defend the action with due diligence and reasonable prudence', but also that 'the opposing party was on notice of facts making that failure apparent.'" *Brown*, 982 F.2d at 390-91 (quotation omitted). Based on the record before this Court, it is highly unlikely an absent class member could sustain this heavy burden.

IV. CONCLUSION

For all the reasons stated by the Washington court in the Opt Out Order, the Jurisdiction Order and the Final Judgment, and for the reasons stated above, this Court should rule that the Washington court had personal jurisdiction over the absent class members for purposes of binding them to the Final Judgment. Accordingly, the Final Judgment extinguishes the claims of the absent class members. Neither a class notice nor class certification in this case are necessary or appropriate. Mr. Lynn's motion for class certification should be denied and Murphey Favre's motion to vacate the order permitting communication with Montana investors should be granted.

Respectfully submitted this 4th day of January, 1995.

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APPENDIX G

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MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY

DEPARTMENT NO. 2 (HENSON)

CAUSE NO. 77454/112

PAUL M. LYNN, on behalf of
all similarly situated persons,

Class Plaintiff,

v.

MURPHEY FAVRE, INC., et al.

Defendants.

PAUL M. LYNN, et al.,

Individual Plaintiffs,

v.

MURPHEY FAVRE, INC., et al.,

Defendants.

MURPHEY FAVRE'S AND INDIVIDUAL DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF LYNN'S MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

Murphey Favre and the Individual Defendants respectfully submit this memorandum in opposition to plaintiffs' motion for class certification. For the reasons stated in Murphey Favre's Reply Memorandum in Support of Motion to Vacate Order Allowing Communication With Montana Investors ("Reply Memorandum"), this Court need not consider or rule upon the class certification motion. As demonstrated in the Reply Memorandum (which is incorporated into this memorandum by reference), the Final Judgment entered in the parallel Washington class action extinguishes the claims of all investors who purchased Homestead Bonds from Murphey Favre *except* the claims asserted by the plaintiffs in this action. Plaintiffs' claims in this case are not extinguished because they (and they alone) excluded themselves from the Washington settlement class.

Even if the Final Judgment had not been entered, however Mr. Lynn's motion for class certification as to the Montana Securities Act, common law fraud, negligent misrepresentation and constructive fraud claims should be denied. Mr. Lynn has not made, or even attempted to make, a factual showing that he had met the requirements of M. R. Civ. P. 23. In fact, he cannot meet these requirements for at least three reasons.

First, Mr. Lynn may obtain certification only if common issues of law or fact *predominate* over individual questions. M. R. Civ. P. 23(b)(3). It is almost hornbook law that the variations in oral representations (like the ones alleged by Mr. Lynn), and the variations in individual investors' circumstances render class treatment inappropriate for oral misrepresentation or omission claims. Individual issues will unquestionably predominate over common ones in this oral misrepresentation case

because (a) each investor will have to prove what he or she was told orally before the jury can determine whether those representations were false or were rendered misleading by virtue of one or more omissions; (b) each investor will have to convince the jury that he or she *actually* and justifiably *relied* on the alleged misrepresentations or omissions in making the investment decision; and (c) each investor will have to prove that this action was filed in a timely fashion as to him or her and that it was reasonable for him or her to ignore the signs of trouble demonstrated by the dramatic drop in the price of the Homestead Bonds more than two years before this action was filed.

With the overwhelming amount of individualized proof that is required from each investor, there is simply no possibility that common issues of law or fact will "*predominate*" over questions of the individual members as required by M. R. Civ. P. 23(b)(3). *See McDonald v. Washington*, 261 Mont. 392, 862 P.2d 1150, 1155 (1993). As the United States Supreme Court has recognized, such individualized proof requirements effectively prevent a class action, "since individual issues then would have overwhelmed the common ones." *Basic, Inc. v. Levinson*, 485 U.S. 224, 242 (1988).

Second, these individualized determinations, requiring literally hundreds of separate minitrials, would impose such a managerial burden and would consume so much of this Court's time that a class action is not "superior" to other means of resolving these claims as required by M.R. Civ. P. 23.

Third, class certification should be denied because Mr. Lynn's claims are not typical, nor is he an adequate class representative. Mr. Lynn will face individual defenses which are not applicable to the class members he seeks

to represent. Mr. Lynn bought his bonds at more than a 20% discount, unlike the other named plaintiffs (and most Homestead Bond purchasers) who purchased Homestead Bonds at par value or at a premium. This fact calls into serious question Mr. Lynn's ability to prove justifiable reliance on the "safe, secure, conservative" representations he alleges and his ability to adequately represent the class. Mr. Lynn will also face significant statute of limitations defenses beyond those generally applicable to class members. These unique defenses threaten to be Mr. Lynn's focus in this litigation, render his claims not typical of the class and make him an inadequate representative of the putative class. Mr. Lynn's apparent lack of control of, commitment to and involvement in the litigation also raise serious questions about his adequacy as a class representative.

II. ARGUMENT

A. Mr. Lynn Must Prove That He Has Satisfied Every Element of M.R. Civ. P. 23.

Class actions must be brought and maintained in strict conformity with the requirements of R. Civ. P. 23. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982). Plaintiffs must prove that each of the four elements of Mont. R. Civ. P. 23(a) and every element of M. R. Civ. P. 23(b)(3) have been satisifed as to *each* claim that they seek to certify.[1] *McDonald v. Washing-*

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[1] M. R. Civ. P. 23(a) and M. R. Civ. P. 23(b)(3) provide as follows:

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of

[footnote continued]

ton, 261 Mont. 392, 862 P.2d 1150, 1155 (1993). The requirements for establishing and maintaining M. R. Civ. P. 23(b)(3) class actions are more exacting than those applicable to M. R. Civ. P. 23(b)(1) or M. R. Civ. P. 23(b)(2) actions. *See Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 69, 102-03 (1966) (advisory committee's notes to Rule 23). Defendants have a strong interest in ensuring the requirements are satisifed so that any judgment issued in a class action will have the broadest possible preclusive effect. *Shutts*, 472 U.S. 790, 805 (1985).[2]

To ensure that putative class actions actually conform to the requirements of M. R. Civ. P. 23, trial courts must perform a rigorous analysis and may "probe behind the pleadings before coming to rest on the certification

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law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition:

. . .

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

[2] Federal cases in interpreting M. R. Civ. P. 23 are persuasive. *McDonald v. Washington*, 862 P.2d at 1154 (1993).

question." *Falcon*, 457 U.S. at 160. *See also Rolex Employees Retirement Trust v. Mentor Graphics Corp.*, 136 F.R.D. 658, 662 (D. Or. 1991); *Kaser v. Swann*, 141 F.R.D. 337, 339 (M.D. Fla. 1991). Thus, the Court is free to consider both the pleadings and facts obtained through the discovery process in deciding whether Plaintiffs have proved that the requirements of M. R. Civ. P. 23 have been satisified. *See Piel v. National Semiconductor Corp.*, 86 F.R.D. 357, 365 (E.D. Pa. 1980). The party seeking class certification bears the burden of demonstrating that the requirements of M. R. Civ. P. 23 are met. *McDonald*, 862 P.2d at 1155 (citing *Doninger v. Pactific Northwest Bell, Inc.*, 564 F.2d 1304 (9th Cir. 1977)).

As will be demonstrated below, class treatment in this case is inappropriate, and class certification should be denied because (a) the claims for which class treatment is requested present an overwhelming predominance of individual issues; (b) Mr. Lynn's claims are not typical because of defenses unique to his claims of reliance and under the statute of limitations; (c) class litigation is not the "superior" method for resolving investors' claims and (d) serious questions exist as to Mr. Lynn's capacity to adequately represent the proposed class.

B. The Claims on Which Mr. Lynn Seeks Class Certification Present Such an Overwhelming Predominance of Individual Issues That Class Treatment Is Inappropriate.

Mr. Lynn seeks class certification of a claim under the Montana Securities Act, M.C.A. §30-10-307, and on claims of common law fraud, negligent misrepresentation and constructive fraud. Class Cert. Brief at 5. Mr. Lynn does not seek certification of the two other claims

alleged in the Second Amended Complaint–breach of fiduciary duty and violation of the Consumer Protection Act. Each of the purported class claims presents issues necessitating multiple individualized determinations. In other words, evidence from every single investor must be presented before liability on any of these claims can be proven. The oral misrepresentation claims alleged by Mr. Lynn involve individual issues as to the content and materiality of the representations, whether they were false and whether they were material or mere nonactionable "sales puff." Each investor must also prove actual and justifiable reliance relied on the alleged misrepresentations.

Plaintiffs' oral omissions claims present a similar multitude of individual issues because Murphey Favre did not have an abstract "duty to disclose" anything to the Plaintiffs. Murphey Favre's only obligation was not to render what was said misleading by virtue of an omission. Even if this case is treated as a mixed case of misrepresentations and omissions, reliance is not presumed. The jury must know what *each* investor *was told* orally before it can decide whether one or more omissions are actionable.

In addition, each of the purported class claims has a "discovery rule" statute of limitations. Because this action was commenced long after the purchases of Homestead Bonds, each investor will have to present evidence that it was reasonable, given his or her own unique knowledge, to have delayed commencement of the action.

Individual issues of fact and law predominate over common issues. Class certification should therefore be denied because Mr. Lynn cannot establish the "predominance" requirement imposed by M. R. Civ. P. 23(b)(3).

1. Claims Based on Nonstandardized Oral Representations Do Not Present Common Issues of Fact That Predominate Over Individual Issues and Cannot Be Certified for Class Treatment.

The predominance issue must be addressed on a claim-by-claim basis, keeping in mind, among other things, the similarity or dissimilarity of the misrepresentations or omissions, by whom the statements or omissions were made, and the time periods involved. *See Hudson v. Capital Management Int'l, Inc.*, 565 F. Supp. 615, 629 (N.D. Cal. 1983).

In *Kaser v. Swann*, the court held that class certification is proper for oral misrepresentation claims only if plaintiffs can prove that oral misrepresentations were uniform and that no material variations existed in the statements made to each member of the class. *Kaser*, 141 F.R.D. at 339. "Generally, an action based substantially on oral rather than written misrepresentations cannot be maintained as a class action." *Westlake v. Abrams*, 575 F. Supp. 58, 62 (N.D. Ga. 1983) (denying class certification). Like the plaintiffs in *Kaser* and *Westlake*, Mr. Lynn has failed to show that there was a "standardized oral misrepresentation" made with regard to Homestead Bonds. Mr. Lynn admitted in his deposition that he has never met any of the other named plaintiffs and does not know what they were told when they purchased Homestead Bonds. Lynn Dep. 122:21-123:16.[3]

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[3] A copy of the deposition of Paul Lynn is attached to the Affidavit of Tim J. Filer in Opposition to Class Certification ("Filer Affid.") as Exhibit B. References to the Lynn Dep. will be by page and line number, *e.g.*, Lynn Dep. 57:21-58:3. Certain of the exhibits to the Lynn Deposition are also attached to the Filer Affid. References to those exhibits shall be by deposition exhibit number, *e.g.*, Lynn Dep. Ex. 1.

Mr. Lynn's affidavit testimony was that simply he bought Homestead Bonds based solely on oral communications with his broker. Lynn Affid. ¶3. Mr. Lynn's deposition testimony is to the same effect.

> Q. Okay. And can you tell me to the best of your recollection, how you learned of them from Mr. Ondrak? Can you tell me about that discussion that you had with him? Was it a phone call, or you were in his office or
>
> A. Um, oh, let's see. Um, I believe he called me and he told me that he had this bond that was – and I'm not sure he gave me the name of it. He probably did, but it was a *safe, secure* bond and that I should invest in it.
>
> Q. And he called you. So this was a phone conversation I take it.
>
> A. Um –
>
> Q. If you can recall.
>
> A. I may have talked to him in his office about – about this.
>
> Q. And can you recall, other than what you just told me, anything else he said about these bonds?
>
> A. My best recollection was he said they were a quality investment that they were *safe and secure*, that *Murphey Favre and Washington Mutual had a position, and that they were appropriate for me I guess.*

Lynn Dep. 67:24-68:21 (emphasis added). Mr. Lynn testified that he received further oral representations as well:

> Q. Did you recall any discussions as to whether or not this was something that would appreciate in value, or was it something that would pay you

income. Do you recall any discussions around that subject?

A. Ah, he told me that it was ah, that it was, um, let's see. He told me that Murphey Favre, ah, and Washington Mutual had a big position. That it was an *excellent investment opportunity for me.* Um, that it was *good quality.* That it paid a *good dividend.* That there was *no risk.* I believe I asked is this a, you know, a risky venture. That there was *no risk* involved and that it was, ah, a a good, ah, opportunity for me.

Q. You talked about a good rate there. Can you recall was there any discussion as to what rate that bonds were paying?

A. He probably told me the rate but one of the key factors was – in my decision was *Washington Mutual was involved because I had bought their bonds before, and they seemed to work fine.*

Lynn Dep. 70:1-20 (emphasis added). Thus, Mr. Lynn has presented no evidence that absent class members received a "standardized" sales pitch. Rather, his testimony makes clear that he had an individual dialogue with his broker before making his investment decision.

It is virtually hornbook law that claims based on non-standardized oral representations do not qualify for class treatment. The cases to this effect are legion. *See, e.g., Clark v. Watchie*, 513 F.2d 994, 1000 n.13 (9th Cir.), *cert. denied*, 423 U.S. 841 (1975); *Seiler v. E.F. Hutton & Co.*, 102 F.R.D. 880, 888-89 (D.N.J. 1984) (citing cases); *Graham v. Security Sav. & Loan*, 125 F.R.D. 687, 690 (N.D. Ind. 1989), *aff'd sub nom. Veal v. First Am. Sav. Bank*, 914 F.2d 909 (7th Cir. 1990); *Glick v. E.F. Hutton & Co.*, 106 F.R.D. 446, (E.D. Pa. 1985); *Miller v. Central Chinchilla Group, Inc.*, 66 F.R.D. 411 (S.D. Iowa 1975) (class treatment of oral misrepresentation claims neither suitable nor expedient).

Put another way, when investors allege brokerage firms defrauded investors, courts generally deny class certification due to the "highly individualized nature of communications" between each investor and each broker. *Seiler*, 102 F.R.D. at 889; *Glick*, 106 F.R.D. at 450. *See also Soper v. Valone*, 110 F.R.D. 8, 9-10 (W.D.N.Y. 1985) (face-to-face oral representations necessarily "are individualized and susceptible of material variations" and do not present common questions susceptible to group determinations).

Mr. Lynn's testimony provides yet another good example of why oral misrepresentation claims are not appropriate for class treatment. Mr. Lynn testified that he was told that Homestead Bonds "were appropriate for me." Lynn Dep. 68:20. Even assuming every investor was told this (defendants do not believe this to be the case), *every* investor would have to put on testimony about his or her financial condition at the time the investment was suggested, as well as evidence concerning his or her investment objectives and risk tolerance at that time before the jury could determine that such a statement was false or misleading. Similarly, to the extent an investor claims there were *omissions* from oral statements, the jury will have to consider the evidence of what *was* said before it can determine whether the omission rendered the statement false or misleading.

With respect to *each* investor, the jury will have to determine what each was told, whether the statements made were false, whether each considered the statements to be material, and whether each relied upon the statements. Thus, class treatment of oral misrepresentation claims would not achieve the purposes of judicial efficiency that underlie M. R. Civ. P. 23. Moreover, the predominance of these individual issues prevents Mr. Lynn

from satisfying the predominance requirement of M. R. Civ. P. 23(b)(3) as to the oral misrepresentation claims.

2. Class Treatment Is Not Appropriate for Claims Requiring Individual Determinations of Reliance.

In *In re Transit Co. Tire Antitrust Litig.*, 67 F.R.D. 59, 72 (W.D. Mo. 1975), the court stated that "if it appears that the class action would in practicality degenerate into multiple lawsuits, class action proceeding is inappropriate." *See also Plekowski v. Ralston Purina Co.*, 68 F.R.D. 443 (M.D. Ga. 1975) (class certification denied if a "minitrial" would be required for each class member). Because each investor must prove reliance to prevail on the purported class claims, minitrials would be necessary to adjudicate the claims.

Individual reliance is an element of every claim on which Mr. Lynn seeks class certification. *See, e.g., Irving v. School District No. 1-1A*, 248 Mont. 460, 813 P.2d 417, 420 (1991) (reliance an element of common law fraud); *Kitchen Krafters, Inc. v. Eastside Bank of Montana*, 242 Mont. 155, 789 P.2d 567, 573 (1990) (constructive fraud and negligent misrepresentation require proof of reliance); *Thiel v. Taurus Drilling Ltd. 1980-II*, 218 Mont. 201, 710 P.2d 33, 39 (1985) (pleadings alleging that defendants has sold partnership units, employing material misrepresentations and omissions which plaintiffs had relied upon, and were injured thereby, stated a claim under the Montana Securities Act). When proof of individualized reliance is required, "there is no possibility that common questions can predominate over individual ones." *In re Hotel Tel. Charges*, 500 F.2d 86, 89 (9th Cir. 1974); *Basic, Inc. v. Levinson*, 485 U.S. 224, 242 (1988) (requiring individualized proof or reliance effec-

tively precludes a class action, because individual issues would overwhelm the common issues).

Federal district courts have consistently refused to certify state law claims for class treatment when those claims require individualized proof of reliance. *See, e.g., Katz v. Comdisco, Inc.*, 117 F.R.D. 403, 412 (N.D. Ill. 1987) (refusing to certify state law claims requiring proof of individual reliance); *In re Consumers Power Co. Sec. Litig.*, 105 F.R.D. 583, 609 (E.D. Mich. 1985) (common law claims raise issues personal to each plaintiff that are, therefore, not common to the class as a whole); *Seiden v. Nicholson*, 69 F.R.D. 681, 686 (N.D. Ill. 1976) (state law misrepresentation claim requiring proof of justifiable reliance not appropriate for class treatment). Inquiries into an investor's justifiable reliance on alleged misrepresentations necessarily involve assessments of the investor's investment history and sophistication, making it impossible to adjudicate those claims on a classwide basis.

Mr. Lynn and the other investors cannot rely upon a presumption of reliance to escape this proof requirement. Murphey Favre's only duty was to refrain from making false or misleading statements. *See Basic, Inc.*, 485 U.S. at 239 n.17 ("Silence, absent a duty to disclose, is not misleading under Rule 10b-5."). In *Chiarella v. United States*, 445 U.S. 222 (1980), the Court stated:

> When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak. We hold that a duty to disclose under §10(b) does not arise from the mere possession of nonpublic market information.

Id. at 235. Thus, each plaintiff must demonstrate that Murphey Favre had an affirmative duty to disclose any

allegedly omitted facts. He or she can do so only by first proving *what was said.*

Even assuming an investor could show an actionable failure to disclose, no presumption of reliance on that omission will arise unless the claim is one based *solely* on omissions. *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972). In cases in which both misrepresentations and omissions are alleged, there is *no* presumption of reliance. *See, e.g., Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 722 (11th Cir. 1987) (no presumption of reliance when disclosures were allegedly rendered misleading by virtue of omissions); *Huddleston v. Hesman & MacLean*, 640 F.2d 534 (5th Cir. 1981), *aff'd in part & rev'd in part on other grounds*, 459 U.S. 375 (1983); *Lubin v. Sybedan Corp.*, 688 F. Supp. 1425, 1446-47 (S.D. Cal. 1988). Thus, each investor must demonstrate how omitted information rendered an actual statement misleading. *See, e.g., Ash v. Brunswick Corp.*, 405 F. Supp. 234, 245 (D. Del. 1975) ("Omissions constitute violations of the Act only if they are both material and make other statements false or misleading," interpreting nearly identically worded Rule 14a-9); *Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1221-22 (9th Cir. 1980) (affirming summary judgment when appellants offered no evidence that disclosure of certain matters "was 'necessary in order to make the statements made . . . not misleading'"); *Rubin v. Long Island Lighting Co.*, 576 F. Supp. 608, 612 (E.D.N.Y. 1984) (omission not actionable unless it is a material fact and adversely affects reliability of a statement); *Perelman v. Pennsylvania Real Estate Inv. Trust*, 432 F. Supp. 1298, 1304-05 (E.D. Pa. 1977) (it is "perfectly obvious that the omissions relied on do not make any of those [alleged] statements false or misleading"); *Taylor v. First Union Corp.*, 857 F.2d

240 (4th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989); *Levine v. NL Indus., Inc.*, 717 F. Supp. 252, *summ. judgment granted*, 720 F. Supp. 305 (S.D.N.Y. 1989), *aff'd*, 926 F.2d 199 (2d Cir. 1991). Reliance cannot properly be presumed on any of the purported class claims, and *each investor will have to prove his or her individual reliance* on any alleged omissions.

Likewise, Mr. Lynn and the other investors cannot rely on a "fraud-on-market" presumption of reliance of the kind adopted in *Basic, Inc. v. Levinson.* For one thing, no state had adopted such a presumption of reliance for the common law claims on which Mr. Lynn seeks class treatment. *See Mirkin v. Wasserman*, 5 Cal. 4th 1082, 858 P.2d 568 (1993). In addition, the Second Amended Complaint does not allege the factual predicate for such a presumption. *See Basic*, 485 U.S. at 142-42 (fraud-on-the-market requires open, developed and efficient market in the securities which were affected by the allegedly false statements). Again, proof of individual reliance is required and makes this case inappropriate for class treatment. *Basic*, 485 U.S. at 242.

This individualized reliance requirement effectively distinguishes this case from *McDonald v. Washington.* In *McDonald*, the Montana Supreme Court recognized that a class can be certified under M. R. Civ. P. 23(b)(3) *only* if "questions of law or fact *predominate* over questions of the individual members." *McDonald*, 862 P.2d at 1157 (emphasis added). In that case, liability for *all* class members was based on a single alleged fact—that the Butte Water Company failed to provide drinkable water and service to its customers. *Id.* In this case, however, liability cannot be established without individual testimony from *each* investor concerning the content of the alleged misrepresentation made to him or her, the investor's justifiable reliance on the statements or omissions *and* (as dis-

cussed below) whether claims arising from the statements or omissions are time-barred. While *McDonald* holds that individual issues of causation and damages will not preclude class certification, the clear implication of *McDonald* is that certification should be *denied* when *liability* depends upon individualized inquiries and determinations of the sort required here. Accordingly, class certification shall be denied.

3. The Court Must Make Individualized Determinations as to Whether Investors' Claims Are Time-Barred.

Individual issues will also predominate over common issues because the Court will have to decide on an investor-by-investor basis whether the investor's claim is barred by the applicable statute of limitations. Investors who purchased their Homestead Bonds before February 11, 1988, will not be allowed to pursue a claim under the Montana Securities Act. *See* M.C.A. §30-10-307(5)(c) (absolute cutoff of five years after transaction). Investors purchasing *after* that date will have to show that they were not on "inquiry notice" of their claims by February 11, 1991, two years before this action was filed. *See* M.C.A. §30-10-307(5)(b) (action under Montana Securities Act must be brought within two years after the investor discovers or should have discovered fraud); M.C.A. §27-2-203 (fraud or negligent misrepresentation claims must also be commenced within two years after fraud was or should have been discovered).

Alternatively, the investor will have to prove facts demonstrating a basis for tolling the statute of limitations. Plaintiffs have already pled and relied on such facts. *See* Opinion and Order, February 16, 1994 (relying on equitable tolling to deny statute of limitations defense

on Rule 12(b)(6) motion). Mr. Lynn's deposition testimony makes it appear he will rely on equitable tolling with regard to the statute of limitations. *See* Lynn Dep. 84:1-8. This determination, standing alone, will require a minitrial before an investor can establish liability. Under these circumstances, common issues *cannot* predominate over individual issues. *See McDonald*, 862 P.2d at 1157 (certification permitted only if liability does not require individualized determinations).

Mr. Lynn has not and cannot satisfy the "predominance" requirement of M. R. Civ. P. 23(b)(3) because the individual issues arising out of the variations in oral representations, the proof of individual reliance and the separate determinations required to decide whether investors' claims are time-barred far outweigh any common issues. Mr. Lynn is required to satisfy *each* element of Rule 23 to obtain class certification. *McDonald*, 862 P.2d at 1155. Because Mr. Lynn fails to establish predominance, class certification should be denied.

C. Mr. Lynn's Claims Are Not Typical Because He Is Subject to Unique Defenses.

M. R. Civ. P. 23(a)(3) requires as a condition of certification that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." *McDonald*, 862 P.2d at 1155. This requirement is independent of the other provisions of M. R. Civ. P. 23(a), and any inquiry into typicality under M. R. Civ. P. 23 requires a comparison of claims or defenses of representative parties to the claims or defenses of the proposed class. *See, e.g., Taylor v. Safeway Stores, Inc.*, 524 F.2d 263 (10th Cir. 1975).

Class certification is inappropriate when a putative class representative is subject to unique defenses that

threaten to become the focus of the litigation. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). The defense need not be a "sure-fire winner." The presence of even an arguable defense peculiar to the proposed representative or a small subset of the class may destroy typicality and bring adequacy into question. *See Williams v. Balcor Pension Investors*, 150 F.R.D. 109 (N.D. Ill. 1993). It is not necessary that the defense asserted against the proposed representative ultimately succeed, only that the defense be unique, arguable and likely to usurp a significant portion of the litigant's time and energy. *See McNichols v. Loeb Rhoades & Co.*, 97 F.R.D. 331, 334 (N.D. Ill. 1982). Class certification should not be granted when there is a danger that absent class members will suffer since the representative will be preoccupied with defenses unique to them. *See, e.g., Hanon*, 976 F.2d at 508. *See also Koos v. First Nat'l Bank*, 496 F.2d 1162, 1164 (7th Cir. 1974); *Blankner v. Chicago*, 504 F.2d 1037 (7th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975). In this case, Mr. Lynn's claims are not typical of those in the class because he faces two unique defenses.

1. Mr. Lynn's Claims Are Not Typical Because His Claim of Reliance Is Subject to Unique Challenges.

As the Court will recall, Mr. Lynn testified that he was told, among other things, the Homestead Bonds were "safe and secure," a "quality investment" and that "there was no risk" involved in the investment. Lynn Dep. 68-70. Mr. Lynn, unlike the other named plaintiffs (and most other Homestead Bond purchasers), however, bought his bonds at more than a 20 percent discount from their par value. Lynn Dep. Ex. 1. Each of the other

named plaintiffs purchased Homestead Bonds at par value or above. *See* Hall Affid. Tab 231 at Exhibits D, E (setting out purchase prices for named plaintiffs). While Mr. Lynn has a self-serving explanation of why he paid such a discounted price ("I was a special customer"– Lynn Dep. 71:12), the more likely explanation is that Mr. Lynn knowingly took on more risk to obtain the high 15% yields being paid on the Homestead Bonds. The jury (or this Court on summary judgment) will ultimately decide that question.

Regardless of the true explanation, Mr. Lynn's purchase of the bonds at a steep discount both distinguishes him from other purchasers and raises serious questions about his ability to convince a jury that he reasonably and justifiably relied on the alleged "safe, secure, no risk" representations. This difference, and the difficulties it poses for Mr. Lynn's case, is sufficient to disqualify Mr. Lynn as a class representative. *See, e.g., Hanon*, 976 F.2d at 508. Accordingly, class certification should be denied.

2. Mr. Lynn's Claims Are Not Typical Because He Is Subject to a Unique Statute of Limitations Defense.

The Court has already recognized that the statute of limitations defense is one that will be made on an investor-by-investor basis based on the inquiry notice standard and questions of equitable tolling. The inquiry notice rule has been explained in a variety of federal and state cases. The essence of the rule is: "The statute of limitations begins to run when the plaintiff has actual knowledge of the fraud *or knowledge of facts sufficient to put a reasonable person on notice.*" *Davis v. Birr, Wilson & Co.*, 839 F.2d 1369, 1370 (9th Cir. 1988) (emphasis

added); *Townsend v. Columbia Operations*, 667 F.2d 844, 850 (9th Cir. 1982) ("The statute of limitations began to run when plaintiffs had inquiry notice.").

Inquiry notice for each plaintiff is determined by an objective standard, rather than a subjective standard. The test is not, was it reasonable for an elderly, unsophisticated investor to ignore a dramatic drop in the price of his or her Homestead Bonds? It means, instead, how would a reasonable person act when he or she learned the information that a particular investor learned, in light of what that particular investor previously had been told about the investment? As the Ninth Circuit has specifically observed, "an objective standard applies to the inquiry notice trigger and . . . summary judgment must be granted if a plaintiff discovered or should have discovered" the basis for a claim. *Davis*, 839 F.2d at 1370. Thus, if a plaintiff has knowledge of facts which would put him on inquiry which if followed would had to knowledge, the plaintiff is deemed to have actual knowledge of the facts. *Mobley v. Holman*, 202 Mont. 227, 657 P.2d 604, 606 (1983). Whether a plaintiff was on inquiry notice is a question of law. *Holman v. Hansen*, 237 Mont. 198, 773 P.2d 1200, 1202 (1989).

Under the Montana standard for inquiry notice, there is little doubt that Mr. Lynn was on inquiry notice prior to February 11, 1991. Mr. Lynn's notice flows from (a) the contradiction between the drop in the market price of the Homestead Bonds and what he claims he was told by his Murphey Favre registered representative at the time of purchase and (b) the sharp distinction between the price of his Homestead Bonds (which plummeted) and the price of his Washington Mutual bonds purchased just a few weeks earlier (which remained above or near par value).

In this regard, Mr. Lynn is remarkably similar to the plaintiffs in *Cook v. Avien, Inc.*, 573 F.2d 685 (1st Cir. 1978). In that case, plaintiffs bought on the representation that the issuer "had a 'rosy' future." *Id.* at 695. Subsequent to making their securities purchases, plaintiffs were exposed to information that the issuer was not performing well financially. The Court of Appeals held that this information constituted inquiry notice and triggered the statute of limitations:

> Once the "inquiry notice" of possible omissions provided by the above facts had triggered the duty to exercise reasonable diligence, the statutory period did not "await appellant's leisurely discovery of the full details to the alleged scheme." *Klein v. Bower*, 421 F.2d 338, 343 (2d Cir. 1970).

Cook, 573 F.2d at 696. *See also Turner v. Lundquist*, 377 F.2d 44 (9th Cir. 1967) (summary judgment on statute of limitations affirmed when plaintiff received later disclosures that conflicted with representation that the issuer was in "sound financial condition"); *Kennedy v. Josepthal & Co.*, 814 F.2d 798 (1st Cir. 1987) ("*Kennedy*"), *affirming* 635 F. Supp. 399 (D. Mass. 1985).

Mr. Lynn claims that his Murphey Favre registered representative Gregory Ondrak told him that the Homestead Bonds were "safe," "secure," "no risk" investments. Lynn Dep. 68-70. Mr. Lynn also claims, however, that "one of the key factors was—in my decision was Washington Mutual was involved because I had bought their bonds before, and they seemed to work fine." Lynn Dep. 70:18-20. In fact, Mr. Lynn had purchased $20,000 of Washington Mutual's bonds approximately six weeks prior to purchasing Homestead Bonds. Lynn Dep. Ex. 1. Mr. Lynn admits that he read and understood the Murphey Favre Securities Account Statements

("Account Statements") sent to him by Murphey Favre. Lynn Dep. 249:15-24. The Account Statements received and read by Mr. Lynn after he purchased his Washington Mutual bonds and Homestead Bonds tell dramatically different stories concerning the relative value of his 15 percent interest rate Homestead Bonds and his 15 percent interest rate Washington Mutual bonds (*see* Lynn Dep. Ex. 10):

Statement Date	Homestead Bond Market Value	Washington Mutual Bond Market Value
4/28/89		107.00
5/26/89	75.00	108.00
6/30/89	55.00	107.00
9/29/89	56.00	107.50
12/29/89	52.00	106.50
1/26/90	50.00	106.00
3/30/90	45.00	107.50
8/31/90	25.00	106.50
9/28/90	25.00	106.50
12/31/90	3.00	97.00

The stark difference in the reported values of these bonds is important for two separate reasons. *First*, the Homestead Bonds drop in market value from the 78 purchase price to the market value of 3 in the span of approximately 18 months is, standing alone, fundamentally inconsistent with representations that the bonds had "no risk" and were "safe and secure." This contradiction is sufficient to trigger inquiry notice. *See Cook*, 573 F.2d at 696.

Second, the problem with the Homestead Bonds is reinforced when their value is compared to the Washing-

ton Mutual bonds that Mr. Lynn testified had "seemed to work fine" and were a "key factor" in his investment decision. Lynn Dep. 70:18-20. Mr. Lynn admits that he recognized the price of his Homestead Bonds was dropping:

> Q. And at some point did you become aware that the Homestead Bonds were going down in price?
>
> A. Well, at some point I believed – you know I believe I raised it with Greg, What's the deal with the – the market price on these bonds?

Lynn Dep. 235:8-12. Mr. Lynn also admits that he considered the Washington Mutual bonds a "fine" investment. Lynn Dep. 238:11. Setting aside Mr. Lynn's self-serving testimony concerning the assurances he claims to have received, the incredible discrepancy between the value of his "fine" Washington Mutual bonds—the price of which remained steadily at par or above—and his Homestead Bonds—which started dropping within *days* after he purchased them—constitutes a unique set of facts which Mr. Lynn will have to defend against the two-year discovery rule statute of limitations. Because of this unique set of facts, Mr. Lynn's claims cannot be typical of the claims of Homestead Bond purchasers. Accordingly, class certification should be denied.

D. Class Litigation Would Impose Excessive Managerial Burdens on the Court and Is Not Superior to Other Available Methods for Resolving Investors' Claims.

In deciding whether to certify a class under M. R. Civ. P. 23(b)(3), the Court must also find that a class action is *superior* to other available methods for the fair and efficient resolution of the claims. *McDonald*, 862 P.2d at 1155. The Court is required to consider "the difficul-

ties likely to be encountered in the management of a class action." M. R. Civ. P. 23(b)(3)(D). Courts properly look beyond the "superficial similarity" of a putative class and should deny class certification when making individualized determinations for each investor would impose "an excessive managerial burden." *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986). In *Bell*, the court found that individualized determinations were required as to each investor regarding materiality, reliance and damages. The difficulties of making these individual findings justified the trial court's denial of certification. *Id.* Because of the numerous individualized showings required from *each* investor in this case, the required "minitrials" would defeat the judicial efficiency purpose of class action proceedings. *Id.*

Mr. Lynn proposes to hold separate hearings on the individual issues after the class action has been tried. *See Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969). To use such a procedure in this case, however, would not serve the purpose of M. R. Civ. P. 23—efficient determination of claims. "When individual rather than common issues predominate, the economy and efficiency of class action treatment are lost . . . ." *Bell*, 800 F.2d at 390 (citation omitted). For each investor, the Court would have to hear evidence on the issues of oral representations, materiality, reliance, and statute of limitations. One federal district court accurately assessed the realities of such a process:

> We firmly believe that the process of individual trials with regard to reliance by perhaps several thousand people is untenable and will result in an unmanageable and unduly time-consuming procedure.

Tober v. Charnita, Inc., 58 F.R.D. 74, 84-85 (M.D. Pa. 1973) (denying certification of state law fraud claim).

Denying certification in this action will also not deprive investors in the Homestead Bonds of an efficient and inexpensive forum for resolving any disputes with Defendants. Arbitration is available (albeit subject to defendants' arguments that the claims are barred by the Final Judgment), under regulatory requirements *entitling* investors to use such forums as the National Association of Securities Dealers ("NASD"). The streamlined discovery procedures and expedited hearing processes of such arbitration forums are specifically designed to handle claims that would not otherwise justify litigation. Montana investors have previously availed themselves of these forums on claims arising from Homestead Bonds purchases.

The requirement for separate trials as to each investor is rooted in fundamental constitutional underpinnings. Forcing Defendants to respond to allegations of oral misrepresentations and reliance and to make their statute of limitations arguments on a classwide basis will, by means of a procedural device, deprive Defendants of the opportunity to put on a meaningful defense to each investor's claims. *See, e.g., Twining v. New Jersey*, 211 U.S. 78, 110-12, 29 S. Ct. 14, 53 L. Ed. 97 (1908) (reasonable notice and fair opportunity to be heard are essential to procedures ascertaining legal rights); *Jacob v. Roberts*, 223 U.S. 261, 265, 32 S. Ct. 303, 56 L. Ed. 429 (1912). For example, it cannot be assumed that the circumstances pertaining to Mr. Lynn's discovery of the pertinent facts are "typical" of the circumstances pertaining to other investors' discovery of the facts triggering the statute of limitations. Defendants' legitimate interest in avoiding grievous loss outweighs any governmental interest in a summary adjudication of typicality. *See Goldberg v. Kelly*, 397 U.S. 254, 262-63, 90 S. Ct. 1011,

25 L. Ed. 2d 287 (1970) (evidentiary hearing required before termination of welfare rights). In addition, investors received myriad different representations by multiple Murphey Favre registered representatives. Due process entitles Defendants to the opportunity to confront and cross-examine each investor as to the facts applicable to his or her particular situation. *See Goldberg,* 397 U.S. at 269. In addition, Defendants have a right to a jury trial of all relevant issues. Mont. Const. art. II §26. Thus, for this additional reason, separate trials will be needed as to each investor.

Class treatment would be improper in this case because of the unmanageable and unduly time-consuming nature of a proceeding requiring hundreds of minitrials. Accordingly, class certification should be denied.

E. Plaintiff Lynn Is Not an Adequate Class Representative.

M. R. Civ. P. 23(a)(4) explicitly requires that a class representative be someone who will "adequately protect the interests of the class." In the absence of an adequate class representative, the Court cannot certify a class. It is the proposed class representative's burden to prove his or her adequacy. *See McDonald*, 862 P.2d at 1155 (citing *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d at 1308); *In re Control Data Corp. Sec. Litig.*, 116 F.R.D. 216, 218 (D. Minn. 1986).

The adequacy standard is critical, since a class representative takes on the burden of protecting the interests of *all* the class members. The adequacy standard is rooted in the constitutional due process requirement. Thus, Defendants have a legitimate interest in the adequacy of the proposed class representatives to ensure that a judgment favorable to Defendants will bind the entire class.

See Shutts, 472 U.S. at 805 (class action defendant has interest in ensuring every member of the class is bound by the class action judgment).

For at least four separate reasons, serious questions exist as to whether Lynn is an adequate class representative.

First, Mr. Lynn is arguably not even a member of the class he seeks to represent. Mr. Lynn wishes to represent *all* Montana purchasers of Homestead Bonds. Second Amended Complaint ¶ 10. Mr. Lynn, however, purchased his Homestead Bonds at deep discounts to their face value. Despite paying this discount, Mr. Lynn testified that he expected to receive both the high interest payments *and* the face value of the Homestead Bonds at redemption. Lynn Dep. 251:24-25 ("they would give me the *face value*, plus some other money"). In other words, Mr. Lynn was speculating that his Homestead Bonds would *both* pay interest *and* be redeemed for face value—a gain of more than 20 percent over his purchase price. This speculation sets Mr. Lynn apart from the vast majority of Homestead Bond purchasers, who paid par or a premium for their bonds and who could possibly have viewed them as a "quality" investment based on that market price. Mr. Lynn cannot represent a class of which he is not a member. *EEOC v. General Tel. Co. of Northwest*, 599 F.2d 322, 327 (9th Cir. 1979), *aff'd*, 445 U.S. 318 (1980). Thus, the Court should find that, at most, Mr. Lynn can represent a class of purchasers who paid 80% or less for their Homestead Bonds.

Second, Mr. Lynn has deferred excessively to his counsel and has not adequately undertaken to supervise and control this litigation. This abdication of responsibility renders Mr. Lynn inadequate as a class representative. *Kassover v. Computer Depot, Inc.*, 691 F. Supp.

1205, 1213-14 (D. Minn. 1987), *aff'd*, 902 F.2d 1571 (8th Cir. 1990). The plaintiff in *Kassover* was unfamiliar with several critical aspects of the litigation. Plaintiff admitted he possessed "'no facts' to support essential allegations in his complaint." *Id.* at 1214. He contented himself entirely to rely upon counsel's direction. *Id.* The court ruled that members of the proposed class must be assured that they have representatives who will check the otherwise unfettered discretion of counsel in prosecuting the suit and will provide their personal knowledge of the facts underlying the complaint. The class is entitled to representatives who are more than a "'key to the courthouse door once entry has been effected.'" *Rolex Employees Retirement Fund*, 136 F.R.D. 658 (D. Or. 1991) (quoting *Saylor v. Lindsley*, 456 F.2d 896, 900 (2d Cir. 1972)).

Mr. Lynn admitted at his deposition that he lacks critical information regarding the allegations of the Second Amended Complaint. Mr. Lynn has never spoken to any of the other named plaintiffs, much less any absent class members, and has no idea what representations or omissions were made to them. Lynn Dep. 122:21-123:16. Mr. Lynn has no idea who Douglas Springer or James Royan are or what role, if any, they played in Murphey Favre's sale of Homestead Bonds. Lynn Dep. 85:13-86:6; 154:1-10. Mr. Lynn could not even remember who the defendants were in this case. Lynn Dep. 15:16-16:3. Mr. Lynn deferred entirely to his counsel in the decision of which persons or entities to name as defendants. Mr. Lynn Dep. 155:10-12; 161:20-23; 162:22-24. Mr. Lynn's utter ignorance of key elements of the underpinnings of this action makes him an inadequate class representative. *See Efros v. Nationwide Corp.*, 98 F.R.D. 703, 707-08 (S.D. Ohio 1983) (plaintiff must be the "driving force"

in securities class action; class certification denied under adequacy test); *Greenspan v. Brassler*, 78 F.R.D. 130, 133-34 (S.D.N.Y. 1978) (class certification denied; plaintiff cannot blindly rely even on competent counsel).

Third, for the reasons discussed above, Mr. Lynn's susceptibility to the unique reliance and statute of limitations defenses makes him an inadequate class representative.

Fourth, Mr. Lynn is apparently either unwilling or unable to meet his financial obligation to pay the costs of this litigation. When a plaintiff does not clearly recognize his or her obligation to bear both his or her own attorney fees and costs (including costs for notice to all class members), and all taxable costs of the litigation, the courts have held that the plaintiff is not an adequate class representative under M. R. Civ. P. 23(a)(4). *See Parker v. George Thompson Ford, Inc.*, 83 F.R.D. 378, 380-81 (N.D. Ga. 1979); *Chmieleski v. City Products Corp.*, 71 F.R.D. 118, 152 (D. Mo. 1976). Before allowing Mr. Lynn to represent a class, this Court must be convinced that Mr. Lynn is willing and financially able to shoulder the burdens of this class representation. At a minimum, this Court must be satisifed that Mr. Lynn's resources are sufficient to preclude the possibility that he could be coerced into complying with counsel's advice because of the potential threat of liability for costs. *See In re ML-Lee Acquisition Fund II, L.P.*, 149 F.R.D. 506 (D. Del. 1993).

Mr. Lynn testified that he did not know whether he had the financial ability to pay the costs of this action:

Q. What's your net worth today?

MR. SNAVELY: Object as irrelevant to the subject matter of the litigation. It seeks confidential financial information.

Q. (By Mr. Medved) You can answer it.

A. I don't know.

Q. You don't know? Do you have any idea?

A. I don't know.

Q. Do you have any idea?

A. I – I don't know.

Q. Do you know–are you worth more than $5.00?

A. I am worth more than $5.00.

Q. Are you worth more than five million dollars?

A. No, I'm not.

Q. So it's in between there, and you don't have any idea as to where it is in between there?

A. I haven't – I don't have an accountant, and I don't keep track of, as you call it, net worth.

Q. So you don't know what your net worth is.

A. I don't know. That was my answer. I don't know.

Lynn Dep. 116:13-117:10.

While Mr. Lynn testified that he understood his responsibility to pay for costs of the litigation, he apparently is not willing to pay costs beyond an amount he would not reveal. *See* Lynn Dep. 105-106. In addition, Mr. Lynn testified that he did not know whether he would pursue this action if it was not certified as a class action. Lynn Dep. 99:4-100:1. Under the authorities cited above, Mr. Lynn is simply not an adequate representative of the putative class.

Not only must Mr. Lynn be an adequate representative of the class, but also it is necessary that Plaintiffs' counsel adequately represent the class. It is absolutely necessary to inquire into the confidence, experience and vigor of

Plaintiffs' counsel, with disqualifying inadequacy being based upon a prospective determination that a conflict of interest is present. *See, e.g., Kuper v. Quantum Chem. Corp.*, 145 F.R.D. 80, 82 (S.D. Ohio 1992), *summ. judgment denied, in part, mot. granted, in part*, 829 F. Supp. 918 (S.D. Ohio 1993). The record before the Court is devoid of any evidence that Mr. Snavely, Mr. Lynn's lead counsel, has any experience in securities cases, much less securities class actions. In addition, Mr. Snavely's 22-month delay in seeking class certification in this case and the delay in asserting his objections to the Washington settlement led the Washington court to conclude that Mr. Lynn was barred from raising those objections under the doctrine of laches and estoppel. Jurisdiction Order (Supp. Hall Affid. Ex. A) at 5. The lack of any evidence of experience or expertise in class actions, combined with the negative findings of the Washington court, raises serious questions about the ability of Mr. Snavely to adequately serve as class counsel.

III. CONCLUSION

The Washington class action Final Judgement extinguishes the claims of all Homestead Bond purchasers other than the named plaintiffs in this action. Consideration of class certification is therefore unnecessary in this case.

If the motion for class certification is considered, it should be denied because the oral misrepresentation claims presented by Mr. Lynn are textbook examples of claims which must be resolved on an investor-by-investor basis. For all of the reasons stated above, class certification should be denied.

Respectfully submitted this 4th day of January, 1995.

FOSTER PEPPER & SHEFELMAN

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Camden M. Hall
Tim J. Filer
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APPENDIX H

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-and-
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Attorneys for Plaintiffs

MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY

DEPARTMENT NO. 2 (HENSON)

Cause No. 77454

PAUL M. LYNN, on behalf of all
similarly situated persons,

Class Plaintiff,

-vs-

MURPHEY FAVRE, INC., et al.,

Defendants.

PAUL M. LYNN, an individual,
MARGARET E. MANDELL and
KIRK G. COMISKEY, et al,

Individual Plaintiffs,

-vs-

MURPHEY FAVRE, INC., a corporation; et al,

Defendants.

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Plaintiff Paul M. Lynn ("Lynn") respectfully submits the following Opening Legal Memorandum in Support of his Motion for Class Certification dated December 15, 1994:

* * *

[5] Plaintiff Lynn seeks to prosecute these common claims on behalf of all Montana residents who purchased Homestead Bonds from the Defendants and all persons who purchased Homestead Bonds through the Montana offices of the Defendants. (Second Amended Complaint, ¶ 10) Plaintiff Lynn seeks to pursue statutory and common law fraud claims on behalf of this class, including claims under the Montana Securities Act [M.C.A. § 30-10-307] and for intentional misrepresentation, negligent misrepresentation and constructive fraud. (Second Amended Complaint, ¶ ¶ 12, 13, 22, 23, 27, 31)

As the Court is aware, another action in the State of Washington (the "Washington Class Action")[2] is also pending. As will be explained later in this brief, the orders of the Court in the Washington Class Action are

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[2]The Washington Class Action is entitled *"Wright v. Murphey Favre, Inc., et al"* and is Case No. 93-2-06519-1 in the Superior Court of King County, Washington.

not binding in this case. By this motion Plaintiffs are seeking certification of the entire class of Montana purchasers, including those who have expressly "opted in" the Washington Class Action. If this motion is granted, notice of the pendency of this case should be sent to all Montana purchasers. Those purchasers who decide to remain a part of the Washington Class Action may do so. Those purchasers who decide to "opt out" of the Washington Class Action may also do so, and may then prosecute their

* * *

APPENDIX I

[Filed DEC 05 1994]

John S. Henson, District Judge
Department No. 2
Fourth Judicial District
Missoula County Courthouse
Missoula, Montana 59802
Telephone: (406) 523-4772

MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY

Cause No. 77454/97

PAUL M. LYNN, on behalf of all
similarly situated persons,

Class Plaintiff,

-vs-

MURPHEY FAVRE, INC. a corporation;
WASHINGTON MUTUAL SAVINGS BANK,
a corporation; DOUGLAS D. SPRINGER,
an individual; GREGORY J. ONDRAK, an individual;
JAMES W. ROYAN, an individual; and DOES 1-100,

Defendants.

OPINION AND ORDER

The matters before the Court are Defendants' motion to stay proceedings in this matter pending the Washington State approval hearing scheduled for December 15,

1994, and Plaintiff's motions to join additional Plaintiffs, compel discovery, and require notice to class.

After due consideration, the stay is hereby lifted. It appears that there are possible legitimate benefits of opting out of the Washington State settlement for Montana purchasers. It also appears that Washington counsel is not anxious for that information to be disseminated amongst Montana purchasers. The Washington State negotiations, affecting Montana purchasers, have occurred without opportunity for Plaintiffs' input. In fact, the Order including Montana purchasers in the settlement was done without notification to Plaintiffs. While the Court cannot ascribe disingenuous intent to Defendants' actions, the Court does determine that lifting of the stay will serve to better ensure all Montana purchasers are apprised of their options. To ensure that, the Court also grants Plaintiffs' motion requiring motion to compel discovery. This discovery is limited to names and addresses and account numbers of any persons who were sold Homestead securities by Murphey Favre through its Montana offices, or any persons who were sold the securities and maintains residence or an address in Montana. Due to the time restrictions in this matter, Defendants shall make this information available to Plaintiffs by December 8, 1994. Plaintiffs may thereafter contact the named individuals to apprise them of the opt out details.

As to the motion to join additional parties, the Court finds the motion to be meritorious, and therefore grants the motion per Rule 20(a), Mont.R.Civ.P.

DATED this 5th day of December, 1994.

/s/ John S. Henson
JOHN S. HENSON
District Judge

cc: Bruce A. McKenzie
Donald Snavely
Camden M. Hall
John D. Lowery
R. Keith Strong

APPENDIX J

[1] IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

Case No. 93-02-06519-1

MARGARET WRIGHT, et al.,

Plaintiffs,

vs.

MURPHEY FAVRE, INC., et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STEVEN SCOTT

1:30 p.m.
December 2, 1994
King County Courthouse
Seattle, Washington

Mary W. Miller, RPR,CSR
Court Reporter

[2] APPEARANCES

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Foster, Pepper &
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FOR MONTANA PLAINTIFFS:

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FOR WASHINGTON MUTUAL:

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HEARING ON RESPONDENT'S MOTION
TO DISMISS FOR LACK OF JURISDICTION
OVER MONTANA INVESTORS

[53] opted out. Those who filed the claims and those who did nothing are still in the class. The people who did nothing had an opportunity to file objections which we believe now has passed.

THE COURT: Including to jurisdiction you're saying?

MR. HALL: Yes.

THE COURT: So if they were, could come in you would have the claim that they waived already.

MR. HALL: Right, and I think Mr. Oliver's declaration goes over the notice. I know Your Honor's reviewed the notice and we believe that it's more than adequate to rebut the positions Mr. Youtz makes.

THE COURT: Let me see if I can decide this now and relatively quickly.

First with respect to the standing issue. It would be my conclusion that Mr. Lynn does not have standing to raise the jurisdictional issue, either on his own behalf because he has opted out or on behalf of the putative class since there has been no certification of that class. And while Mr. Lynn may have responsibilities to the class, he does not, that is in the sense of the Roper case where the plaintiff goes out and dismisses, certainly he cannot take action that would harm the class, but whether or not he has the right, an obligation to affirmatively represent them here, I would conclude that he [54] does not and, therefore, has no standing to bring this motion, nor to, just briefly address the other motion before the Court, nor does he have standing to file objections to the settlement on behalf of putative class members.

So quickly that motion will be granted; that is, the motion we really have not discussed this afternoon, that is the motion to direct the administrator to disregard improper requests for exclusion, that motion will be granted.

Whether or not I go beyond that now it seems to me is a difficult question. I am going to go on and address the merits of this Court's jurisdiction over Montana investors. I'm going to do it, Mr. Youtz, for the reason you've suggested; that is, that this Court, if for what-

ever reason jurisdiction is brought to the Court's attention, and there is a serious question about jurisdiction, it seems to me proper to address it now rather than later. The effect of doing that with respect to those individuals who have neither opted in nor filed a claim in Montana, for example, I have nothing to say about and that argument will be for another day, but I will decide for purposes of this case as least the jurisdictional issue because it seems to me better to resolve it now rather than later.

I would also consider it an alternative holding basically; that is, should the Court of Appeals or Supreme Court for that matter disagree with respect to standing, it [55] seems to me the Court should at least as an alternative address the merits of the motion and I will do so for that reason as well.

I think with respect to the laches argument that the ruling has to be basically in two parts: One, assuming Mr. Lynn does have standing to represent the entire class and two, assuming he does not, whether he in some way or those individual plaintiffs represented by Mr. Snavley and Mr. Youtz have waived in the sense of a laches argument any claims they have for themselves individually.

As to Mr. Lynn individually, it would seem to me that there were, and I understand the procedural mine field and I think it's demonstrated in part by the fact that Mr. Lynn is now opted out and is trying to raise a jurisdictional motion, so I think clearly there are the kind of procedural concerns that Mr. Youtz indicated in terms of how to proceed, but I am convinced that there were things that Mr. Lynn could have done to address jurisdiction, reasonable things, both in terms of his own individual interests and for that matter in terms of the class, if he were representing the class, to address the kinds of

concerns that are being raised on this jurisdictional issue prior to now, and I don't think there's any question that significant. In fact, overwhelming amounts of time and resources have gone into getting to this stage of the proceeding and that the timing of these [56] objections in my mind comes too late. That relates, though, to Mr. Lynn.

With respect to other class members and the laches argument, I'm going to reject the argument because, and I'm not sure – I may be going in circles, but it seems to me that in my view it is clear that Mr. Lynn was not acting – even accepting that he has standing to bring this motion on behalf of putative class members – it's clear to me he was not acting or failing to act in any way that would bind those same putative class members with respect to the laches argument. So in other words, I just want to clarify with the laches argument I'm accepting as to Mr. Lynn individually but I'm rejecting as to putative class members, even assuming Mr. Lynn has standing to bring the jurisdictional issue on behalf of the class members. So that the class members themselves would not be barred by laches from raising jurisdiction, although Mr. Lynn himself would.

As to the merits, I'm going to conclude that the class – insofar as it relates to jurisdiction, the class was properly certified by Judge Ellington. I would note still, Mr. Hall, erroneously possibly, but in my view that order of Judge Ellington certifying the class would be the law of the case. I would be reluctant to overturn it absent some clearer order, but beyond that I would agree on the merits with Judge Ellington's ruling, that the class was appropriate as defined [57] and as certified.

As to the notice, I agree with the plaintiffs and the defendants. I don't think that notice is the place for a

debate over which state's law is preferable from the plaintiffs' standpoint. Mr. Youtz, with respect to – and frankly, at this point I see considerations going both ways and I will just say that I intend to address it on the 15th in terms of approval of the settlement. There are clearly it seems to me under Judge Henson's ruling punitive damages available for the fraud claim, that's not to say that they can be established.

I don't know, Mr. Oliver, specifically what evidence there is here of fraud but punitive damages would not be available. There are individual, insofar as I can tell, individual CPA treble damages available in Montana, There also are considerations cutting the other direction, obviously. The statute of limitations, one, and I recognize the ruling on the motion to dismiss, although the rule was simply that the plaintiffs had pleaded adequate facts, and that certainly is not dispositive of a statute of limitations defense. So if the statute of limitations defense is successful there, all of the other issues obviously go down the drain and that's a consideration going in the other direction.

The Washington Mutual argument, the judge certainly [58] did express some serious concerns about whether Washington Mutual would be in the case at all and that also is a fact cutting in favor of Washington. But as to an ultimate conclusion as to where they come out, I would certainly not be inclined to reach that judgment in terms of jurisdiction.

Mr. Youtz, you argued I don't have to reach that kind of a judgment because at the very least it ought to go into the class notice. And that may or may not be correct and I'll address that now, but that, it seems to me, is not a jurisdictional issue, that is whether that kind of debate ought to take place in the class notice, unless

it were crystal clear to me that Montana law was more favorable.

It seems to me given the definition of the class, the adequacy of the class representatives in terms of the claims being made, that jurisdiction exists here, so that the question becomes whether the adequacy of the notice, and on that issue I agree with the parties in this case. The notice is not the place to debate that. I think it would be totally unmanageable to do so, and in that regard I conclude that the notice was sufficient. I also conclude the notice was sufficient in all other respects with respect to advising putative class, I guess class members for settlement purposes of the terms of the settlement their rights and the consequences of the various actions available to them.

I would note, I think, that some of the points [59] raised by Mr. Youtz would indicate that perhaps notice could have been different and even better, but that's not to say that the notice was inadequate or that it was unclear. In my view the notice was adequate in all those respects.

As to the adequacy of the representation, in all respects, with respect to whether the named plaintiffs are adequate factually, that is with respect to commonality of facts, commonality of legal issues, whether counsel is vigorously and adequately representing the class, in all of those respects I find that the adequacy of representation is adequate and sufficient. In fact, more so – in excess of adequate with respect to the representation itself.

The representation of plaintiffs has been vigorous and as has the defense and there's no question that the quality of the representation, as well as the commonality issues, has been met. There is, it seems to me, the issue of fairness of the settlement with respect to those investors in Montana which we've discussed in terms of

differences in the law and differences in fact, and I will address that at the December 15th hearing on approval of the settlement, but the notice itself is sufficient, jurisdiction is here, the class is appropriately defined.

Let me just, with respect to those differences, I just want to note, as Mr. Oliver has argued, there are going to be individual claims and cases it would seem to me in [60] almost any class action that are different than those addressed by the class action, so that there may be differences that Montana plaintiffs have that would lead them to opt out. But my conclusion is that they have been adequately notified that they have the opportunity and they know it of seeking legal advice, independent legal advice and making that decision based on all of these countervailing considerations and arguments as to the law and the facts, and that would be true, as I say, it would seem to me in almost any class action.

So to conclude on the basis that there are differences that the settlement is unfair, I think, or beyond that, there's simply no jurisdiction, would be frankly an injustice potentially to members of the Montana class, because even though, Mr. Youtz, you're not asking that they be dismissed, it would seem to me if there's no jurisdiction, there's no jurisdiction. So that those who have neither opted in or opted out earlier in the process, I suppose you could argue that they could come in and waive jurisdiction, and maybe they could, but it would raise serious concerns in my mind about excluding people on the jurisdictional basis and possibly not even giving them notice of the class. If these arguments had been raised in what would my view be a timely fashion, then notice – investors in Montana arguably would not even have an opportunity to opt in and waive [61] jurisdictional issues, so I question whether it's a jurisdictional issue rather than a fairness issue. And as to the fairness

issue it seems to me the Court has to recognize that there are differences and look at the overall settlement to determine the fairness issue and I'll do that on December the 15th.

I think I've hit everything I intended to hit and, Mr. Hall, I frankly have not compared your order to my anticipated oral ruling to see how they hook up. I think what I would suggest is that all of you sit down, consider what I've said and how it corresponds to what you've said and if there are adjustments that need to be made, you can do that.

MR. HALL: I would like clarification, if I may. You said that Mr. Lynn had, if I can, committed laches as to his individual claim but not in his representative capacity as the representative of the putative class.

THE COURT: I did.

MR. HALL: How did that happen?

THE COURT: Let me see if I can do it. First I held that he doesn't have standing at all to represent the putative class, then I tried to address the merits, assuming he had standing. And all I'm saying is that even though I'm assuming he has standing to bring this jurisdictional motion, I'm not going to go so far as to assume that he had the authority and right to be representing them and acting on

* * *

APPENDIX K

The Honorable Steven Scott

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 93-2-06519-1

MARGARET WRIGHT, an individual; RODERICK KIRKWOOD and JANE DOE KIRKWOOD, husband and wife; GENE V. CUSHWAY, an individual; JACK LEACH and THELMA L. LEACH, husband and wife; ON THEIR OWN BEHALF AND ON BEHALF OF AND AS CLASS REPRESENTATIVES OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

v.

MURPHEY FAVRE, INC., a Washington corporation; WASHINGTON MUTUAL SAVINGS BANK, INC., a Washington corporation; WM FINANCIAL, INC., a Washington corporation; LEE J. SAHLIN and JANE DOE SAHLIN, husband and wife; BEN L. BROOKS and JANE DOE BROOKS, husband and wife; KIENTZENE M. FELICE and JANE DOE FELICE, husband and wife; DAVID C. LYNCH and JANE DOE LYNCH, husband and wife; LOUIS H. PEPPER and JANE DOE PEPPER, husband and wife; KERRY K. KILLINGER and JANE DOE KILLINGER, husband and wife; MICHAEL D. TOWERS and JANE DOE TOWERS, husband and wife; WILLIAM G. PAPESH and JANE DOE PAPESH, husband and wife; GENE G. BRANSON and

JANE DOE BRANSON, husband and wife; CRAIG S. HOBBS and JANE DOE HOBBS, husband and wife; CRAIG E. TALL and JANE DOE TALL, husband and wife; DAVID J. DIRECTOR and JANE DOE DIRECTOR, husband and wife,

Defendants.

STIPULATION OF SETTLEMENT
[CR 2A]

[1] STIPULATION OF SETTLEMENT

Pursuant to CR 2A and subject to the approval of the Superior Court of the State of Washington for King County (the "Court"), this Stipulation of Settlement ("Stipulation") is made as of August 11, 1994, by and among the plaintiffs Margaret Wright, Roderick Kirkwood, Sharon P. Kirkwood, Gene V. Cushway, Jack Leach and Thelma L. Leach on behalf of themselves, their respective marital communities (as applicable), and as representatives of the Class, as defined in paragraph VIII(A)(7) below (collectively "Plaintiffs"); by defendants Murphey Favre, Inc., Washington Mutual Savings Bank ("WMSB"), WM Financial, Inc., Lee J. Sahlin and Jane Doe Sahlin, Ben L. Brooks and Jane Doe Brooks, Kientzene M. Felice and James Doe Felice, David C. Lynch and Jane Doe Lynch, Louis H. Pepper and Jane Doe Pepper, Kerry K. Killinger and Jane Doe Killinger, Michael D. Towers and Jane Doe Towers, William G. Papesh and Jane Doe Papesh, Gene G. Branson and Jane Doe Branson, Craig S. Hobbs and Jane Doe Hobbs, Craig E. Tall and Jane Doe Tall, David J. Director and Jane Doe Director and their respective marital communities (as applicable) (collectively "Defendants"), by

and through their attorneys of record in the above-captioned action; and by The Aetna Casualty and Surety Company under its Designated Insured Persons and Company Reinbursement Policy No. 095 LB 100685899 BCA (hereinafter "Insurer"), by and through its counsel Ross, Dixon & Masback.[1]

I. DESCRIPTION OF THE ACTION

On March 15, 1993, a class action complaint, King County Superior Court Cause No. 93-2-06519-1, was filed by all Plaintiffs (except Jack and Thelma Leach, who were later added as Plaintiffs) against Defendants. On January 11, 1994, Plaintiffs, pursuant to an order of the Court dated December 20, 1993, filed a second amended class action complaint [2] styled Second Amended Complaint for Violations of Securities Laws, Violations of Consumer Protection Act, and Breach of Fiduciary Duty/Common Law Unsuitability (the "Second Amended Complaint"). The Second Amended Complaint alleged claims against some or all Defendants for violation of the Washington State Securities Act ("WSSA"), RCW 21.20.010 *et seq.*; the Washington Consumer Protection Act, RCW 19.86.010 *et seq.*; and breach of fiduciary duty/common law unsuitability. Plaintiffs sought to bring these claims on their own behalf and as representatives of the class consisting of all Persons who purchased Homestead Bonds through or from Murphey Favre, regardless of their state of residence and including, without limitation, persons residing in Washington, Oregon, California, Idaho, Montana and Arizona.

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[1] Unless otherwise defined, the capitalized terms used in parts I-VII of this Stipulation shall have the meanings assigned to them in part VIII(A) below.

On February 1, 1994, Plaintiffs moved the Court for an order certifying a class. Defendants filed their opposition to class certification on April 1, 1994. Plaintiffs' motion for certification of the class is pending as of the date of this Stipulation. Also pending as of the date of this Stipulation are Plaintiffs' motion for partial summary judgment against Murphey Favre on WSSA violations and Defendants' motion for summary judgment on the statute of limitations. On May 17, 1994, Plaintiffs, Defendants and Insurer, through their counsel, entered into a Memorandum of Settlement ("Memorandum of Settlement") that generally described the terms of the Settlement, but which was subject to the negotiation and entry of this Stipulation. Pursuant to an agreed order, all proceedings in this action have been stayed pending negotiation and entry of this Stipulation.

II. CLASS CERTIFICATION

Solely for the purpose of the settlement set forth in this Stipulation (the "Settlement"), the parties will jointly request the Court to enter an order in the form of the Proposed Order Certifying Class and Preliminarily Approving Settlement and Approving the Form and Manner of Notice ("Certification and Notice Order"), attached as Exhibit A hereto, [3] determining that a class will be certified in this action, for settlement purposes only, as to all claims asserted in the Second Amended Complaint or which have been asserted or could have been asserted by Persons in the Class. The Class will include all persons who meet the criteria set

forth in ¶ VIII(A)(7) below. It is estimated that the total principal amount paid by Persons in the Class for Homestead Bonds is $23,280,511.

If this Stipulation is not finally approved, or is terminated or canceled, or if the Effective Date, defined below at ¶ VIII(A)(11), does not occur for any reason, this stipulation for class certification, made solely for the purposes of this Settlement, shall be null and void, the Certification and Notice Order shall be vacated, and the parties will revert to their respective positions immediately prior to the execution of the Memorandum of Settlement.

III. DISCOVERY IN THE ACTION

The parties have conducted significant discovery and investigation of the facts and law during the prosecution of this action, including extensive document requests and review and analysis of voluminous responses thereto, numerous interrogatories and requests for admissions and detailed responses thereto, a number of subpoenas to third parties and the inspection and analysis of documents produced by them, interviews of potential witnesses, and depositions of several persons, including the Representative Plaintiffs and the president of Murphey Favre. Counsel for the parties have further investigated the law applicable to the facts of the alleged claims of the Class and potential defenses thereto, and the damages claimed by the Class. The parties have retained and extensively consulted with various expert consultants.

IV. BENEFITS OF SETTLEMENT TO THE CLASS

Class Counsel and the Representative Plaintiffs recognize the expense and length of continued proceedings

necessary to continue the litigation against Defendants through trial

* * *

[6] VIII. TERMS OF THE STIPULATION OF SETTLEMENT

A. Definitions.

As used in this Stipulation, the following terms have the following meanings:

1. "Approval Date" means the date the Court shall enter a Final Judgment and Order of Dismissal With Prejudice substantially in the form of Exhibit B to this Stipulation (the "Judgment"), approving the Settlement.

2. "Authorized Claimant" means any Class Member who purchased Homestead Bonds from Murphey Favre during the Class Period and who Timely files a Valid Proof of Claim and Release and who meets the criteria set forth in ¶ VIII(E)(3) below.

3. "Claim" and "Claims" mean class or individual claims, causes of action, demands, rights, asserted liabilities, damages, losses, fees, costs or expenses of any kind whatsoever.

4. Except as otherwise ordered by the Court, "Claimant" means any Class Member who Timely files a Valid Proof of Claim and Release.

5. "Claim Period" has the meaning assigned to it in ¶ VIII(E)(3)(a) below.

6. "Claims Administrator" has the meaning assigned to it in ¶ VIII(E)(3)(a) below.

7. "Class" means the Representative Plaintiffs and all Persons who purchased Homestead Bonds from Murphey Favre at any time during the Class Period or such Persons

who, as of the end of the Claim Period (as defined in ¶ VIII(E)(3)(a) below), hold the causes of action alleged in the Second Amended Complaint, but excludes any Person who has previously settled with and released any of the Defendants from claims arising out of or relating to the purchase of Homestead Bonds from or through Murphey Favre.

8. "Class Member" means any Person who is a member of the Class, but excludes any Person who submits a valid and Timely request for exclusion pursuant to the

* * *

[8] 16. "Homestead Bonds" means both (a) the fifteen percent (15%) debentures issued pursuant to the indenture dated September 15, 1985, between Homestead and Bank America Trust Company of New York as Trustee, and the thirteen and three-eighths percent (13 3/8%) debentures issued pursuant to the indenture dated March 1, 1986, between Homestead and First Interstate Bank of California as Trustee; and (b) any beneficial, partial or fractional interest in those subordinated debentures including, without limitation, the "fractional shares" referred to in the Second Amended Complaint, purchased from Murphey Favre during the Class Period.

17. "Homestead Bond Notice and Administration Fund" means the fund established by Murphey Favre's transfer of a total of One Hundred Thousand and No/100 U.S. Dollars ($100,000.00) to an account as directed by Plaintiffs' Counsel (but subject to reasonable review by counsel for Defendants and Insurer), together with all interest earned thereon, net of taxes, after deposit

and pursuant to the provisions otherwise set forth in this Stipulation.[2]

18. "Homestead Bond Settlement Fund" and "Settlement Fund" mean the fund established by Murphey Favre's transfer to the Escrow Agent of a total of Eleven Million Nine Hundred Thousand and No/100 U.S. Dollars ($11,900,000.00), together with all interest earned thereon, net of taxes, after deposit through the date of disbursement as provided herein and subject to the provisions otherwise set forth in this Stipulation and any

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[2]The Homestead Bond Settlement Fund and the Homestead Bond Notice and Administration Fund were simultaneously established by a single payment of Twelve Million U.S. Dollars ($12,000,000.00) made by Murphey Favre on behalf of all Defendants and Insurer.

* * *

[10] 25. "Person" means any individual, corporation, partnership, association, joint stock company, trust, unincorporated association, retirement plan, entity, government and any political subdivision thereof, or any other type of legal entity.

26. "Plaintiffs" means Margaret Wright, Roderick Kirkwood, Sharon P. Kirkwood, Gene V. Cushway, Jack Leach and Thelma L. Leach and their respective marital communities (as applicable), acting on behalf of themselves and as representatives of the Class.

27. "Plaintiffs' Counsel" and "Class Counsel" mean James A. Oliver and law firm of Short Cressman & Burgess.

28. "Plan of Allocation" means the plan or formula of allocation and distribution of the Settlement Fund set forth herein at ¶ VIII(E)(3), whereby the Settlement

Fund shall be distributed to Authorized Claimants, and/or partially refunded to Defendants and Insurer, after payment of Notice and Administration Costs; taxes on the earnings of the Settlement Fund, including any penalties or late fees, and expenses incurred in assessing and paying such tax liabilities; an incentive award of $2,000 to each of the four plaintiffs and/or their marital communities up to a maximum amount of $8,000 if such an award is approved by the Court; and such attorney fees, costs, and expenses as may be awarded by the Court.[4]

29. "Released Claims" or "Settled Claims" means any and all causes of action, demands, rights, damages, liabilities, fees, costs, or claims of any nature whatsoever, known or unknown, that have been, could have been, or in the future could be asserted by any Class [11] Member against any of the Released Parties, including any claims previously dismissed by any court, arbitrator or the Court, based upon facts, transactions, events, occurrences, acts, misrepresentations or omissions alleged in, arising out of, or in any way related to the allegations in the Second Amended Complaint or based on, related to, or arising out of the subject matter of the Second Amended Complaint. "Released Claims" and "Settled Claims" also include "Unknown Claims" (defined below as ¶ VIII(A)(35)).

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[4]The Securities Exchange Commission has historically opposed the payment of additional compensation to a plaintiff class representative. *See* Fed. Sec. L. Rep. (CCH) No. 1577 (October 13, 1993) at 5. Defendants, Insurer and their counsel do not support, endorse or approve of the payment of incentive payments to the Representative Plaintiffs. Solely for purposes of the Settlement, however, Defendants and Insurer agree not to object to an application by Class Counsel payments to the Representative Plaintiffs in the amounts set forth in the text.

30. "Released Parties" means Defendants and Insurer and their respective past, present and future directors, officers, partners, principals, employees, agents, underwriters, reinsurers, coinsurers, controlling shareholders, attorneys, accountants, auditors, advisors, consultants, representatives, parent corporations, subsidiaries, affiliates, heirs, predecessors, successors, assigns, any entity now or in the past controlled by them or controlling them, any trust of which they are the settlor or which is for their benefit or the benefit of their spouses, heirs, affiliates or associates (as defined in SEC Rule 12b-2 promulated pursuant to the Securities Exchange Act of 1934) and members of their immediate families.

31. "Representative Plaintiffs" means Plaintiffs acting on behalf of themselves and as representatives of the Class as defined in ¶ VIII(A)(7).

32. "Second Amended Complaint" means the Second Amended Complaint for Violation of Securities Laws, Violation of Consumer Protection Act, and Breach of Fiduciary Duty/Common Law Unsuitability, filed on or about January 11, 1994, in the action pending in the Superior Court of Washington for King County under Cause No. 93-2-06519-1.

33. "Settling Parties" means, collectively, each of the Defendants, the Representative Plaintiffs on behalf of themselves and each Class Member, every Class Member, and Insurer.

34. "Timely," when used in connection with Proof of Claim and Release forms or requests for exclusion from the Class, means that such documents have been mailed or

* * *

APPENDIX L

[1]

CIVIL TRACK I
JUDGE STEVEN SCOTT

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CLASS ACTION
NO. 93-2-06519-1

MARGARET WRIGHT, an individual; RODERICK KIRKWOOD and SHARON P. KIRKWOOD, husband and wife; GENE V. CUSHWAY, an individual; JACK LEACH and THELMA L. LEACH, husband and wife; ON THEIR OWN BEHALF AND ON BEHALF OF AND AS CLASS REPRESENTATIVES OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

v.

MURPHEY FAVRE, INC., a Washington corporation; WASHINGTON MUTUAL SAVINGS BANK, INC., a Washington corporation; WM FINANCIAL, INC., a Washington corporation; LEE J. SAHLIN and JANE DOE SAHLIN, husband and wife; BEN L. BROOKS and JANE DOE BROOKS, husband and wife; KIENTZENE M. FELICE and JANE DOE FELICE, husband and wife; DAVID C. LYNCH and JANE DOE LYNCH, husband and wife; LOUIS H. PEPPER and JANE DOE PEPPER, husband and wife;

KERRY K. KILLINGER and JANE DOE KILLINGER, husband and wife; MICHAEL D. TOWERS and JANE DOE TOWERS, husband and wife; WILLIAM G. PAPESH and JANE DOE PAPESH, husband and wife; GENE G. BRANSON and JANE DOE BRANSON, husband and wife; [2] CRAIG S. HOBBS and JANE DOE HOBBS, husband and wife; CRAIG E. TALL and JANE DOE TALL, husband and wife; DAVID J. DIRECTOR and JANE DOE DIRECTOR, husband and wife,

Defendants.

SECOND AMENDED COMPLAINT FOR VIOLATION OF SECURITIES LAWS, VIOLATION OF CONSUMER PROTECTION ACT, AND BREACH OF FIDUCIARY DUTY/ COMMON LAW UNSUITABILITY

Plaintiffs allege:

PARTIES

1. Plaintiff Margaret Wright ("Wright") is a single person residing in King County, Washington.

2. Plaintiffs Roderick Kirkwood and Sharon P. Kirkwood ("Kirkwood") are husband and wife and reside in King County, Washington.

3. Plaintiff Gene V. Cushway ("Cushway") is a single person residing in King County, Washington.

4. Plaintiffs Jack Leach and Thelma L. Leach ("Leach") are husband and wife and reside in Pierce County, Washington.

5. Defendant Murphey Favre, Inc. ("Murphey Favre") is a Washington corporation which transacts business in King County, Washington.

6. Defendant Washington Mutual Savings Bank, Inc. ("Washington Mutual") is a Washington corporation which transacts business in King County, Washington. Defendant Murphey Favre is one of its subsidiaries.

7. Defendant WM Financial, Inc. ("WM Financial") is a Washington corporation which transacts business in King County,

* * *

[8] funds for their children. Lafler also advised that Washington Mutual was buying these debentures for its own account. Relying on these statements and recommendations, Leach purchased what they believed to be $15,000 worth of Homestead debentures through Mr. Lafler on July 14, 1988.

26. Prior to selling what were represented to be Homestead debentures to all the plaintiffs, Murphey Favre failed to disclose numerous material facts concerning the recommended investments. Without limitation, included among those material omissions are the following:

(a) None of the plaintiffs were informed that Homestead issues its debentures in minimum denominations of $100,000;

(b) None of the plaintiffs were informed that Murphey Favre was selling fractional shares of Homestead debentures ("New Securities");

(c) None of the plaintiffs were informed that the New Securities they purchased should have been registered because they were not exempt from state and federal registration requirements;

(d) None of the plaintiffs were informed that the sale of allegedly Homestead debentures to them in

denominations of less than $100,000 violated applicable FHLBB regulations;

(e) None of the plaintiffs received an offering circular, and therefore, none of the plaintiffs were aware of all of the information which would have been contained in such an offering circular;

* * *

[11] disbursements would be subject to the risk of insolvency of the registered Holder and any intervening party through which the disbursements might be transmitted.

(q) None of the plaintiffs were informed that there was an indenture or indentures that set forth the rights of a registered Holder, and none of the plaintiffs were provided with a copy of the indenture or indentures.

27. These fractional shares constituted New Securities, because the success of these investments depended (a) on Murphey Favre's services in creating and maintaining a market for the fractional shares of Homestead debentures which it sold to plaintiffs, (b) on the financial integrity and solvency of the registered Holder of the debentures and all intermediate parties for prompt and proper disbursement of all funds received as the result of being a registered Holder of the debenture, (c) on the registered Holder and any intervening party to promptly forward all information supplied to the registered Holder, and (d) on the registered Holder to make prompt and prudent decisions as permitted by the indentures governing the rights of registered debenture Holders. Because of the large denominations in which Homestead debentures

were issued, many of the plaintiffs and class members would not have been able to purchase Homestead "debentures," save for the extra services performed by Murphey Favre, the registered Holders, and any intervening parties.

* * *

[14] understood this, in part, because of the location of Murphey Favre's offices and signs in Washington Mutual branches, from the close relationship and communications between the Washington Mutual personnel and the Murphey Favre registered representatives, from the apparent combined operations of Washington Mutual and Murphey Favre at the Washington Mutual branches, and in the case of Kirkwood and Leach, from Murphey Favre's representations that Washington Mutual was also buying these Homestead debentures.

CLASS ACTION ALLEGATIONS

34. Plaintiffs bring this action as a class action, on behalf of themselves and also as representatives on behalf of all the members of the class made up of the purchasers of the New Securities from or through Murphey Favre. This is an appropriate class action and the plaintiffs are appropriate representatives of the plaintiff class because:

a. The class is so numerous the joinder of all members is impracticable. The plaintiffs do not know the exact number of persons who constitute members of the class, but believe that its numbers exceed one thousand five hundred persons. Therefore, it is impracticable to bring all class members before the court, and CR 23(a)(1) is satisfied.

b. There are questions of law and fact common to the class. Murphey Favre sold New Securities throughout the State of Washington by misrepresenting and failing to

disclose many material aspects of these investments, thereby engaging in a

* * *

APPENDIX M

[1] CIVIL TRACK I
JUDGE STEVEN SCOTT

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CLASS ACTION
NO. 93-2-06519-1

MARGARET WRIGHT, an individual; RODERICK KIRKWOOD and SHARON P. KIRKWOOD, husband and wife; GENE V. CUSHWAY and GERALDINE L. CUSHWAY, husband and wife; JACK LEACH AND THELMA L. LEACH, husband and wife; ON THEIR OWN BEHALF AND ON BEHALF OF AND AS CLASS REPRESENTATIVES OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

v.

MURPHEY FAVRE, INC., a Washington corporation; WASHINGTON MUTUAL SAVINGS BANK, INC., a Washington corporation; WM FINANCIAL, INC., a Washington corporation; LEE J. SAHLIN and JANE DOE SAHLIN, husband and wife; BEN L. BROOKS and JANE DOE BROOKS, husband and wife; KIENTZENE M. FELICE and JANE DOE FELICE, husband and wife; DAVID C. LYNCH and JANE DOE LYNCH,

husband and wife; LOUIS H. PEPPER and JANE DOE PEPPER, husband and wife; KERRY K. KILLINGER and JANE DOE KILLINGER, husband and wife; MICHAEL D. TOWERS and JANE DOE TOWERS, husband and wife; WILLIAM G. PAPESH and JANE DOE [2] PAPESH, husband and wife; GENE G. BRANSON and JANE DOE BRANSON, husband and wife; CRAIG S. HOBBS and JANE DOE HOBBS, husband and wife; CRAIG E. TALL and JANE DOE TALL, husband and wife; DAVID J. DIRECTOR and JANE DOE DIRECTOR, husband and wife,

Defendants.

AMENDED COMPLAINT FOR VIOLATION OF SECURITIES LAWS, VIOLATION OF CONSUMER PROTECTION ACT AND BREACH OF FIDUCIARY DUTY/COMMON LAW UNSUITABILITY

Plaintiffs allege as follows:

PARTIES

1. Plaintiff Margaret Wright ("Wright") resides in King County, Washington.

2. Plaintiffs Roderick Kirkwood and Sharon P. Kirkwood ("Kirkwood") are husband and wife and reside in King County, Washington.

3. Plaintiffs Gene V. Cushway and Geraldine L. Cushway ("Cushway") are husband and wife and reside in King County, Washington.

4. Plaintiffs Jack Leach and Thelma L. Leach ("Leach") are husband and wife and reside in Pierce County, Washington.

5. Defendant Murphey Favre, Inc. ("Murphey Favre") is a Washington corporation which transacts business in King County, Washington.

6. Defendant Washington Mutual Savings Bank, Inc. ("Washington Mutual") is a Washington corporation which transacts

* * *

[8] Mr. Lafler recommended Homestead bonds as a very conservative investment. Leach was interested in a long-term, safe investment with a good rate of return. Leach was interested in preserving funds for their children. Leach asked Lafler if Homestead was a California bank. Lafler said it was not. Lafler also advised that Washington Mutual was buying these bonds for its own account. Relying on these statements and recommendations, Leach purchased what they believed to be $15,000 worth of Homestead bonds through Mr. Lafler on July 14, 1988.

26. Prior to selling what were represented to be Homestead bonds to all the plaintiffs, Murphey Favre failed to disclose numerous material aspects of these investments. Without limitation, included among those material omissions are the following:

(a) None of the plaintiffs were informed that Homestead initially issued its bonds in minimum denominations of $100,000;

(b) None of the plaintiffs were informed that Murphey Favre had acquired a large quantity of these $100,000 Homestead bonds and then resold fractional shares of them ("New Securities"); these fractional shares constituted New Securities because the success of these investments depended on Murphey Favre's services in

creating and maintaining a market for the transmogrified chunks of Homestead bonds which it sold to plaintiffs; because of the large denominations in which Homestead bonds were issued, many of the plaintiffs and class members would

* * *

[11] 29. Homestead was in deep financial trouble by late 1990. To prevent Homestead from going into receivership, it was proposed that all outstanding Homestead bonds be converted into preferred stock. Eventually, many class members chose to convert whatever it was they held to preferred stock in 1991. The bonds were essentially valueless at the time of the exchange. Kirkwood, Wright and Cushway converted their investments to preferred stock. Leach did not convert their investment, and still retain whatever it is they purchased from Murphey Favre.

30. The conversion of Homestead bonds to preferred stock ultimately failed to save Homestead. On October 30, 1992, Homestead was closed by the Office of Thrift Supervision and the Resolution Trust Corporation was appointed sole receiver. Holders of the preferred stock were informed that it was unlikely they would receive any distributions.

31. All of the plaintiffs lost their entire investments. Some now hold worthless preferred stock in Homestead; others have retained the worthless New Securities. All who retain New Securities are more than willing to tender them in exchange for the consideration paid for them, plus interest and attorneys' fees.

CLASS ACTION ALLEGATIONS

32. Plaintiffs bring this action as a class action, on behalf of themselves and also as representatives on behalf of all the members of the class made up of the purchasers of the New Securities from or through Murphey Favre. This is an appropriate

* * *

APPENDIX N

[Filed MAR 15 1993]

[1] IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NO. 93 2 06519

CLASS ACTION

MARGARET WRIGHT, an individual; RODERICK KIRKWOOD and JANE DOE KIRKWOOD, husband and wife; GENE V. CUSHWAY and GERALDINE L. CUSHWAY, husband and wife,

ON THEIR OWN BEHALF AND ON BEHALF OF AND AS CLASS REPRESENTATIVES OF ALL OTHER PERSONS, SIMILARLY SITUATED

Plaintiffs,

v.

MURPHEY FAVRE, INC., a Washington corporation; WASHINGTON MUTUAL SAVINGS BANK, INC., a Washington corporation; WM FINANCIAL, INC., a Washington corporation; LEE J. SAHLIN and JANE DOE SAHLIN, husband and wife; BEN L. BROOKS and JANE DOE BROOKS, husband and wife; KIENTZENE M. FELICE and JANE DOE FELICE, husband and wife; DAVID C. LYNCH and JANE DOE LYNCH, husband and wife; LOUIS H. PEPPER and JANE DOE PEPPER, husband and wife; KERRY K. KILLINGER and JANE DOE KILLINGER, husband and wife; MICHAEL D. TOWERS and JANE DOE TOWERS,

husband and wife; WILLIAM G. PAPESH and JANE DOE PAPESH, husband and wife; GENE G. BRANSON and JANE DOE BRANSON, husband and wife; CRAIG S. HOBBS and JANE DOE [2] HOBBS, husband and wife; CRAIG E. TALL and JOHN DOE TALL, husband and wife; DAVID J. DIRECTOR and JANE DOE DIRECTOR, husband and wife,

Defendants.

COMPLAINT FOR VIOLATION OF SECURITIES LAWS, VIOLATION OF CONSUMER PROTECTION ACT AND BREACH OF FIDUCIARY DUTY

Plaintiffs allege as follows:

PARTIES

1. Plaintiff Margaret Wright resides in King County, Washington.

2. Plaintiffs Roderick Kirkwood and Jane Doe Kirkwood are husband and wife and reside in King County, Washington.

3. Plaintiffs Gene V. Cushway and Geraldine L. Cushway are husband and wife and reside in King County, Washington.

4. Defendant Murphey Favre, Inc. ("Murphey Favre") is a Washington corporation which transacts business in King County, Washington.

5. Defendant Washington Mutual Savings Bank, Inc. ("Washington Mutual") is a Washington corporation which transacts business in King County, Washington.

Defendant Murphey Favre is its wholly owned subsidiary.

6. Defendant WM Financial, Inc., is a Washington corporation which transacts business in King County, Washington. Defendant Murphey Favre is its wholly owned subsidiary.

7. Defendants Lee J. Sahlin and Jane Doe Sahlin are husband and wife and reside in King County, Washington. All acts allege

* * *

[5] FACTS

20. All of the named plaintiffs were sold what they believed were Homestead bonds between January 1, 1987 and December 31, 1988 by Murphey Favre. Murphey Favre recommended Homestead bonds to all plaintiffs, and represented Homestead bonds as good, conservative investments.

21. Relying on Murphey Favre's representations as to the quality of Homestead bonds as conservative investments, all of the plaintiffs purchased varying quantities of what they thought were Homestead bonds during the above described time period.

22. Homestead initially issued these bonds at a price of $100,000. The intended purchasers of these bonds were large, institutional investors such as banks and mutual funds. Murphey Favre acquired a large quantity of these $100,000 Homestead bonds and then resold fractional shares of them to the plaintiffs. Murphey Favre did not disclose to any of the plaintiffs the fact that they were actually purchasing fractional shares of $100,000 Homestead bonds ("New Securities"). None of the plaintiffs learned of the true nature of their

investments until early 1991, and none of the plaintiffs were informed that the New Securities were neither registered nor exempt from state and federal registration requirements.

23. In early 1989, the market price of Homestead bonds began to drop precipitously. By mid-1989, Murphey Favre ceased making a market for the New Securities which it had sold to the plaintiffs.

[6] 24. Prior to 1987, Washington Mutual or its subsidiaries had purchased approximately $7 million worth of Homestead bonds. Washington Mutual had sold all of its Homestead bonds by December of 1989. None of the plaintiffs were informed that Washington Mutual had sold its Homestead bonds at that time.

25. Homestead was in deep financial trouble by late 1990. To prevent Homestead from going into receivership, it was proposed that all outstanding Homestead bonds be converted into preferred stock. Eventually the bonds were converted to preferred stock in June of 1991. The bonds were essentially valueless at the time of the exchange.

26. The conversion of Homestead bonds to preferred stock ultimately failed to save Homestead. On October 30, 1992, Homestead was closed by the Office of Thrift Supervision and the Resolution Trust Corporation was appointed sole receiver. Holders of the preferred stock were informed that it was unlikely they would receive any distributions.

27. All of the plaintiffs lost their entire investments.

CLASS ACTION ALLEGATIONS

28. Plaintiffs bring this action as a class action, on behalf of themselves and also as representatives on

behalf of all the members of the class made up of the purchasers of the New Securities. This is an appropriate class action and the plaintiffs are appropriate representatives of the plaintiff class because:

* * *

CONSOLIDATED CHRONOLOGY OF SELECTED EVENTS IN THE WASHINGTON ACTION, THE MONTANA ACTION, AND THE MONTANA WRIT PROCEEDINGS MAY 1994 – OCTOBER 1995

Date	Proceeding (App. Reference)	Description of Event
5/17/94	Washington Action (App. 30a)	The Washington Action settles on behalf of "all Homestead Bond purchasers" after multiple-day mediation. Counsel in the Montana Action notified the next day.
8/11/94	Washington Action (App. 147a-156a)	Stipulation of Settlement of Washington Action is executed and entered by the parties.
8/11/94	Washington Action (App. 11a-13a)	The Washington court enters the Order Certifying Class and Preliminarily Approving Settlement and Approving the Form and Matter of Notice. Settlement class of "all Homestead Bond purchasers" is certified.

(continued)

Date	Proceeding (App. Reference)	Description of Event
9/27/94	Montana Action	Mr. Lynn files his Motion to Require Notice to [the Montana] Class before the Montana court.
11/28/94	Washington Action (App. 23a)	Mr. Lynn files his Motion to Dismiss for Lack of Jurisdiction Over Montana Investors before the Washington court.
12/2/94	Washington Action (App. 138a-146a)	The Washington court hears oral argument on Mr. Lynn's Motion to Dismiss for Lack of Jurisdiction Over Montana Investors, and orally denies that motion.
12/5/94	Montana Action (App. 135a-137a)	The Montana court enters the Opinion and Order Allowing Communication with Montana Bond Purchasers.
12/8/94	Montana Action (App. 52a)	Petitioners file their Motion to Vacate [the Montana court's] Order Allowing Communication with Montana Bond Purchasers before the Montana court.

(continued)

Date	Proceeding (App. Reference)	Description of Event
12/15/94	Washington Action (App. 11a-27a)	The Washington court enters the Order Denying [Mr. Lynn's] Motion to Dismiss for Lack of Jurisdiction Over Montana Investors. The Washington court also enters the Final Judgment And Order of Dismissal with Prejudice.
12/15/94	Montana Action (App. 132a-134a)	Mr. Lynn files his motion before the Montana court to certify a class which includes investors whose claims were dismissed by the Final Judgment entered in the Washington Action.
1/4/94	Montana Action (App. 43a-131a)	Petitioners file their Reply Memorandum in Support of Motion to Vacate Order Allowing Communication with Montana Investors and their Memorandum in Opposition to Motion for Class Certification, bringing to the Montana court's attention the Final Judgment in the Washington Action and its resulting obligation to accord Full Faith and Credit to the Final Judgment.

(continued)

Date	Proceeding (App. Reference)	Description of Event
5/8/95	Washington Action (App. 178a-181a)	Accounting and Proposed Distribution of Settlement Funds filed in Washington Court by the parties to that action.
6/2/95	Washington Action (App. 178a-181a)	The Washington court enters its first Order Authorizing Distribution of settlement proceeds to members of the Washington class.
6/14/95	Washington Action (App. 178a-181a)	The Washington court enters its second Order Authorizing Distribution of settlement proceeds to members of the Washington class.
7/25/95	Washington Action (App. 178a-181a)	The Washington court enters its third Order Authorizing Distribution of settlement proceeds to members of the Washington class.
7/27/95	Montana Action (App. 3a-10a)	The Montana court enters its Opinion and Order Denying Defendant's Motion to Vacate Order Allowing Communication with Montana Investors And Certifying A Class.

(continued)

Date	Proceeding (App. Reference)	Description of Event
8/18/95	Montana Writ Proceedings (App. 28a-42a)	Petitioners file their Application for Writ of Supervisory Control or Other Appropriate Writ of Relief and Request for Stay before the Montana Supreme Court based on Full Faith and Credit and the Washington court's Final Judgment.
9/26/95	Montana Writ Proceedings (App. 1a-2a)	The Montana Supreme Court enters its Dismissal Order denying Petition for Writ of Supervisory Control, and reserving the Full Faith and Credit issues for resolution on appeal.

APPENDIX P

CAMDEN M. HALL
FOSTER PEPPER & SHEFELMAN
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101
(206) 447-4400
Attorneys for Petitioners

IN THE
SUPREME COURT OF THE UNITED STATES

CAUSE NO. _____

MURPHEY FAVRE, INC., WASHINGTON MUTUAL SAVINGS BANK, WM FINANCIAL, INC., GREGORY ONDRAK, JAMES ROYAN and DOUGLAS SPRINGER,

Petitioners,

v.

DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, HON. JOHN S. HENSON, Presiding Judge, and PAUL M. LYNN, et al.,

Respondents.

AFFIDAVIT OF CAMDEN M. HALL REGARDING AMOUNTS PAID IN SETTLEMENT OF WASHINGTON ACTION TO MEMBERS OF CLASS CERTIFIED BY MONTANA COURTS

STATE OF WASHINGTON)
) ss.
County of King)

CAMDEN M. HALL, being first duly sworn, states as follows:

1. I am an attorney at law in good standing with and duly licensed to practice law in the highest court of the State of Washington and a member of the District of Columbia Bar. I am admitted to practice before the United States Supreme Court and other federal courts. I have been a partner in the law firm of Foster Pepper & Shefelman, in Seattle, Washington, for over 20 years.

2. I am attorney of record for petitioners Murphey Favre, Inc., Gregory Ondrak, James Royan, and Douglas Springer, in this matter and in trial court proceedings in the state courts of Montana ("Montana Action"). I also represented Murphey Favre, Inc. and the individual defendants in *Wright v. Murphey Favre, Inc., et al.*, (the "Washington Action"). As such, I have personal knowledge of the following facts and I am competent to testify to them.

3. The Washington Action was settled in 1994 and was given final judicial approval in a Final Judgment and Order Of Dismissal With Prejudice dated December 15, 1994 (the "Final Judgment"). The Final Judgment dismissed all of the claims of the class, including class members who either resided or purchased Homestead Bonds in the state of Montana. According to Murphey Favre's records, the Washington settlement class included Montana residents or persons purchasing Homestead Bonds through Murphey Favre's Montana office holding 139 accounts. The holders of 16 of these accounts expressly requested exclusion from the Washington settlement

class. These "opt outs" are the named plaintiffs in the Montana Action. Of the remaining 123 accounts, Proof of Claim and Release forms were filed on behalf of the holders of 112 accounts. Thus, more than 91 percent of the Montana bond purchasers who did not request exclusion actually filed claims with the Claims Administrator of the Washington settlement. The Claims Administrator has disbursed more than $752,000.00 to the Montana bond purchasers who filed claims.

4. A true and correct copy of the Proof of Claim and Release required to be submitted by Homestead Bond purchasers in order to receive a distribution in settlement of the Washington Action is set forth at Appendix 182a-195a. The Proof of Claim and Release form was included in the record which Petitioners made available to the Montana Supreme Court.

FURTHER, your affiant sayeth not.

Executed at Seattle, Washington this 19th day of December, 1995.

_____

Camden M. Hall

SUBSCRIBED AND SWORN to before me this 19th day of December, 1995.

_____

(Signature of Notary)

_____

(Legibly Print or Stamp Name of Notary)

Notary public in and for the state of Washington,
residing at _____
My appointment expires _____

APPENDIX Q

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

NO. 93-2-06519-1

MARGARET WRIGHT, an individual, et al.,

Plaintiffs,

v.

MURPHEY FAVRE, INC.,
a Washington corporation, et al.,

Defendants.

PROOF OF CLAIM AND RELEASE

I. INSTRUCTIONS

1. PLEASE READ THE NOTICE OF PENDENCY OF CLASS ACTION, PROPOSED SETTLEMENT OF CLASS ACTION, AND HEARING ON PROPOSED SETTLEMENT (THE "NOTICE"), WHICH ACCOMPANIES THIS PROOF OF CLAIM AND RELEASE. THE INFORMATION IN THE NOTICE IS INCORPORATED INTO THIS PROOF OF CLAIM AND RELEASE BY THIS REFERENCE. UNLESS OTHERWISE DEFINED, CAPITALIZED TERMS IN THIS PROOF OF CLAIM AND RELEASE HAVE THE MEANINGS ASSIGNED TO THEM IN THE NOTICE AND THE STIPULATION OF SETTLEMENT ON FILE WITH THE COURT.

2. TO BE ENTITLED TO RECEIVE ANY PAYMENT IN CONNECTION WITH THE SETTLEMENT, YOU MUST MAIL THIS PROOF OF CLAIM AND RELEASE

WITH THE SUPPORTING DOCUMENTS IDENTIFIED BELOW ON OR BEFORE OCTOBER 24, 1994 TO THE CLAIMS ADMINISTRATOR AT:

Homestead Bond Litigation
Gilardi & Co.
P.O. Box 5100
Larkspur, California 94977-5100

IF YOU HAVE ANY QUESTIONS ABOUT ANY OF THESE INSTRUCTIONS, FORMS, OR THE SUPPORTING PAPERS REQUIRED TO ESTABLISH YOUR CLAIM, CALL THE CLAIMS ADMINISTRATOR, TOLL-FREE, AT 1-800-654-5763

3. TO BE ELIGIBLE TO SHARE IN THE NET SETTLEMENT FUND, (a) YOU MUST HAVE PURCHASED HOMESTEAD BONDS FROM MURPHEY FAVRE DURING THE PERIOD JANUARY 1, 1987, THROUGH SEPTEMBER 30, 1991, INCLUSIVE (THE "CLASS PERIOD") OR HOLD THE CAUSES OF ACTION, IF ANY, ARISING FROM SUCH PURCHASES; (b) YOU MUST NOT BE A PERSON WHO HAS PREVIOUSLY RELEASED ANY DEFENDANT FROM CLAIMS ARISING OUT OF OR RELATING TO THE PURCHASE OF HOMESTEAD BONDS FROM OR THROUGH MURPHEY FAVRE; AND (c) YOU MUST NOT HAVE EXCLUDED YOURSELF FROM THE CLASS AS PROVIDED IN THE NOTICE.

4. To receive a distribution from the Settlement Fund, you must complete and sign this Proof of Claim and Release. If you fail to Timely file a properly addressed and fully completed Proof of Claim and Release, signed under penalties of perjury, together with the supporting documents or the sworn statement specified in paragraph 12 of these Instructions, your claim may be rejected

and you may be precluded from any recovery from the proposed Settlement.

5. If you are a Class Member, you will be bound by the terms of any Judgment entered in the litigation in connection with the Settlement WHETHER OR NOT YOU SUBMIT A PROOF OF CLAIM AND RELEASE.

6. You may receive more than one copy of the Notice or this Proof of Claim and Release form. Regardless of how many copies you receive, you should submit only one Proof of Claim and Release form.

7. All joint purchasers must sign this Proof of Claim and Release. Executors, administrators, guardians, conservators and trustees must complete and sign this Proof of Claim and Release on behalf of persons represented by them and must identify each beneficial owner for whom they are acting; proof of their authority must accompany this claim, and their titles or capacities must be provided. The Social Security (or taxpayer identification) number and telephone numbers of the beneficial owner(s) must be provided. Failure to provide the foregoing information could delay verification or result in the rejection of the claim.

8. Use the schedules in Part II below to supply all required details of each of your transaction(s) with Murphey Favre, Inc., in Homestead Bonds during the Class Period. If you need more space or additional schedules, attach separate sheets giving all of the required information in substantially the same form. Sign and print or type your name and Social Security (or taxpayer identification) number on each additional sheet.

9. On the schedules, provide all of the requested information with respect to all purchases and sales of Homestead Bonds. The failure to report all such transactions may result in the rejection of your claim.

10. List each transaction separately and in chronological order, beginning with the earliest. You must accurately provide the month, day and year of each transaction you list.

11. Identify all Homestead Bonds disposed of for no cash, consideration or value during the Class Period. In other words, identify all Homestead Bonds that you did not sell, but that you disposed of by gift, inheritance, bequest; by reason of marriage or marital dissolution; in connection with the dissolution or winding up of any entity of which you were a beneficial owner (such as a partnership or corporation); through the distribution of the assets of any entity of which you were a beneficial owner (such as a partnership or corporation) or any other transfer of ownership for which consideration was not given or received. For each such transfer of ownership, the "price per bond" listed in Parts II and III should be $0, and the nature of the acquisition or disposition should be briefly stated (e.g., "inheritance").

12. COPIES OF BROKERS' CONFIRMATIONS, ACCOUNT STATEMENTS, TAX RETURN SCHEDULES, CANCELLED CHECKS OR OTHER VERIFIABLE DOCUMENTATION OF EACH OF YOUR TRANSACTIONS IN HOMESTEAD BONDS MUST BE ATTACHED TO YOUR PROOF OF CLAIM AND RELEASE FORM OR YOU MUST PROVIDE A SWORN STATEMENT, SIGNED UNDER PENALTY OF PERJURY EXPLAINING WHY YOU ARE UNABLE TO PROVIDE SUCH DOCUMENTATION. FAILURE TO ATTACH THIS DOCUMENTATION OR THE STATEMENT WILL RESULT IN THE DENIAL OF YOUR CLAIM.

II. CLAIM INFORMATION

The information requested in the following schedules will be used to calculate the amount, if any, you will receive from the Settlement Fund if you are an Authorized Claimant. Please provide all information requested below and complete the schedules as directed by the Instructions set forth above.

SUPERIOR COURT OF
THE STATE OF WASHINGTON
FOR KING COUNTY

Wright et al. v. Murphey Favre et al.
Civil Action No. 93-2-05619-1

PROOF OF CLAIM AND RELEASE
Please Type or Print Legibly

PART I: CLAIMANT INFORMATION

_____

Telephone Number (Day)

_____

Telephone Number (Evening)
(Telephone number(s) where Claimant(s) can be reached for clarification of claim, if necessary.)

_____

SOCIAL SECURITY NUMBER OR OTHER FEDERAL TAXPAYER IDENTIFICATION NUMBER

PART II: PURCHASES of Homestead Bonds from Murphey Favre During the Class Period (January 1, 1987 to September 30, 1991, inclusive)

Trade Date of Purchases
Mo. Day Year

1. _____
2. _____
3. _____
4. _____

Face Amount Purchased/Interest Rate

_____
_____
_____
_____

Purchase Price

$_____
$_____
$_____
$_____

Proof of Purchase Enclosed?

Yes	**No**
_____	_____
_____	_____
_____	_____
_____	_____

PART III: SALES of Homestead Bonds Listed Above

Trade Date of Sales
Mo. Day Year

1. _____
2. _____
3. _____
4. _____

Face Amount Sold/Interest Rate

_____
_____
_____
_____

Sales Proceeds

$ _____
$ _____
$ _____
$ _____

Proof of Sale Enclosed?
Yes No

_____ _____
_____ _____
_____ _____
_____ _____

*IMPORTANT: FAILURE TO ATTACH COPIES OF SUPPORTING DOCUMENTATION FOR EACH OF THE TRANSACTIONS AND HOLDINGS IDENTIFIED ABOVE OR A SWORN STATEMENT EXPLAINING SUCH FAILURE WILL PREVENT RECEIPT OF DISTRIBUTIONS UNDER THE SETTLEMENT.

II. SUBMISSION TO JURISDICTION OF COURT

I submit this Proof of Claim and Release under the terms of the Stipulation of Settlement described in the Notice. I also submit to the jurisdiction of the Superior Court of the State of Washington for King County (the "Court") with respect to my claim as a Class Member and for purposes of enforcing the release set forth herein. I further acknowledge that I am bound by and subject to the terms of any Judgment that may be entered in connection with the Settlement. I agree to furnish additional information to support this claim if requested to do so. I authorize any bank, investment firm or brokerage house with whom I transact business to release to Class Counsel or the Claims Administrator upon their request and without notice to me, any and all information relating to any purchase or sale of Homestead Bonds by me during the Class Period.

IV. RELEASE

1. I acknowledge full and complete satisfaction of all Released Claims (as that term is defined in the Notice and the Stipulation) and do fully, finally and forever release and discharge Murphey Favre, Inc., Washington Mutual Savings Bank, WM Financial, Inc., Lee J. Sahlin and Jane Doe Sahlin, Ben L. Brooks and Jane Doe Brooks, Kientzene M. Felice and James Doe Felice, David

C. Lynch and Jane Doe Lynch, Louis H. Pepper and Jane Doe Pepper, Kerry K. Killinger and Jane Doe Killinger, Michael D. Towers and Jane Doe Towers, William G. Papesh and Jane Doe Papesh, Gene G. Branson and Jane Doe Branson, Craig S. Hobbs and Jane Doe Hobbs, Craig E. Tall and Jane Doe Tall, David J. Director and Jane Doe Director and their respective marital communities (as applicable), and their respective past, present and future directors, officers, partners, principals, employees, agents, underwriters, issuers, insurers (including the Insurer identified in the Stipulation), coinsurers, reinsurers, controlling shareholders, attorneys, accountants, auditors, advisors, consultants, representatives, divisions, heirs, predecessors, successors, assigns, subsidiaries, affiliates, any entity now or in the past controlled by them or controlling them, any trust of which they are the settlor or which is for their benefit or the benefit of their spouses, heirs, affiliates or associates (as defined in SEC Rule 12b-2 promulgated pursuant to the Securities Exchange Act of 1934), and members of their immediate families, (collectively, the "Released Parties") from all Released Claims, including, without limitation, any and all causes of action, demands, rights, damages, liabilities, fees, costs, or claims of any nature whatsoever, known or unknown, that have been, could have been, or in the future could be asserted by any Class Member against any of the Released Parties, including any claims previously dismissed by the Court, based upon the facts, transactions, events, occurrences, acts, misrepresentations or omissions arising out of, or in any way related to the purchase of Homestead Bonds (as defined in the Stipulation) and any claims alleged or which could have been alleged in the Second Amended Complaint. "Released Claims" includes "Unknown Claims" as defined in the Notice.

2. This Release shall be of no force or effect unless the Court approves the Stipulation of Final Settlement at or after the Settlement Hearing and unless the Judgment becomes effective as to all Defendants on the Effective Date.

V. TAX INFORMATION

SUBSTITUTE FORM W-9

TO RECEIVE ANY MONEY, YOU MUST FULLY COMPLETE AND EXECUTE THE SUBSTITUTE FORM W-9 SET FORTH BELOW IN ACCORDANCE WITH THE INSTRUCTIONS ATTACHED TO THIS FORM AS EXHIBIT 1. CAREFULLY FOLLOW THE INSTRUCTIONS SET FORTH IN EXHIBIT 1 FOR FILLING OUT THE SUBSTITUTE FORM W-9, AS FAILURE TO PROPERLY COMPLETE IT MAY RESULT IN DENIAL OF YOUR REQUEST FOR A DISTRIBUTION FROM THE SETTLEMENT FUND.

[See Following Page]

Substitute Form W-9

Give this form to the requester. Do NOT send to IRS

REQUEST FOR TAXPAYER
IDENTIFICATION NUMBER AND CERTIFICATION

(Please print or type)

Name (if joint names, list first and circle the name of the person or entity you enter in Part I below. See Instructions on page 2 of Exhibit 1 to this Notice ("Ex. 1") if your name has changed.)

Business name (Sole proprietors see instructions on Ex. 1, page 2.) (If you are exempt from backup withholding, complete this form and enter "EXEMPT" in Part II below.)

Address (number and street)

City state, and ZIP code

List account number(s) here (optional)

PART 1 Taxpayer Identification Number (TIN)

PART II For Payees Exempt From Backup Withholding (See Exempt Payees and Payments Ex. 1, page 2)

Enter your TIN in the appropriate box. For individuals, this is your social security number (SSN). For sole proprietors, see the instructions on Ex. 1, page 2. For other entities, it is your employer identification number (EIN). If you do not have a number, see How To Obtain a TIN in Ex. 1.

Social Security Number
OR
Employer identification number

Note: *If the account is in more than one name, see the chart on Ex. 1, page 2 for guidelines on whose number to enter.*

Requester's name and address (optional)

Certification. – Under penalties of perjury, I certify that:

1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and
2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding.

Certification Instructions. – You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding becuse of underreporting interest or dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, the acquisition or abandonment of secured property, contributions to an individual retirement arrangement (IRA), and generally payments other than interest and dividends, you are not required to sign the Certification, but you must provide your correct TIN. Also see **Signing the Certification** on Ex. 1, page 2.)

Sign Here

Signature Date

VI. EXECUTION

I declare under penalty of perjury that the information supplied by the undersigned in this Proof of Claim and Release form is true and correct, that I wish to enter into this Release and that this Proof of Claim and Release form was executed at (indicate city and state where signing), _____
this _____ day _____, 19 _____

Signature:

_____
(Sign your name here)

_____
(Type or print your name here)

_____
(Signature of Joint Owner, If Any)

_____
(Type or Print Name of Joint Owner Here)

_____
(Capacity of Persons signing, e.g.,
Beneficial Owner, Executor or Administrator)

IMPORTANT: IF THIS PROOF OF CLAIM IS BEING SUBMITTED ON BEHALF OF JOINT OWNERS, OR IS BEING SUBMITTED BY LEGAL REPRESENTATIVES ON BEHALF OF A CLASS MEMBER, IT MUST BE SIGNED BY ALL JOINT OWNERS OR LEGAL REPRESENTATIVES.

Reminder Checklist:

1. Please sign the Proof of Claim and Release form.
2. Remember to attach all supporting documentation.
3. If you move, please send us your new address.

3

Supreme Court, U.S.
FILED
FEB 1 1996
CLERK

No. 95-995

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MURPHEY FAVRE, INC.,
WASHINGTON MUTUAL SAVINGS BANK,
GREGORY ONDRAK, JAMES ROYAN and
DOUGLAS SPRINGER,

Petitioners,

v.

PAUL M. LYNN, on behalf of himself and
all similarly situated person, and THE DISTRICT
COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE SATE OF MONTANA, IN AND FOR THE
COUNTY OF MISSOULA, THE HONORABLE
JOHN S. HENSON, PRESIDING JUDGE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF IN OPPOSITION

DONALD V. SNAVELY
SNAVELY LAW FIRM
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Attorneys for Paul M. Lynn

42 pp

QUESTIONS PRESENTED FOR REVIEW

Respondent PAUL M. LYNN ("Respondent") respectfully submits that the questions presented for review, as phrased by Petitioners, are inaccurate. The correct questions for review are:

1. Is a state court's determination in a class action that it has personal jurisdiction over nonresident absent class members binding upon the resident state court of those absent class members where they did ***not*** participate, either personally or through an authorized representative, in the proceedings in the nonresident state court?

2. May absent, nonresident class members collaterally attack the jurisdiction of a distant forum over them in the courts of their state of residence where they did ***not*** participate, either personally or through an authorized representative, in the proceedings in the nonresident forum?

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STATEMENT OF THE CASE

Petitioners have selectively cited the record below, and ignored important facts from the record, in their Petition for a Writ of Certiorari dated December 21, 1995 ("Petition"). This section will clarify the factual record.

The action ("Montana Action") from which the Petition arises is a class action suit for securities fraud brought under the Montana Securities Act (Montana Code Annotated Sections 30-10-101 *et seq.*) and Montana common law. Petitioners are the stock brokerage firm and individual brokers who, in 1986 through 1989, marketed *from their offices in Montana* corporate bonds ("Homestead Bonds") issued by Homestead Savings, a federal savings and loan association of Millbrae, California. Petitioners promoted the Homestead Bonds as conservative, investment grade securities, suitable for elderly and fiduciary investors seeking a fixed rate of return with minimal risk. Washington Mutual Savings Bank ("Washington Mutual"), the parent corporation of Murphey Favre, joined in this marketing scheme by circulating *in Montana* financial reports which evaluated the Homestead Bonds as a secure, conservative investment. (Appendix 201a-202a)[1]

---

1. All references to the Appendix are to the separate Appendix submitted with the Petition, except for Item R of the Appendix. Appendix R is an excerpt of Respondent's brief filed in the Montana trial court in opposition to Petitioners' motion to vacate that Court's order requiring notice to be sent to the Montana investors. Appendix R is attached at the end of this brief. It has been numbered consecutively (pages 196a-206a) with the pages in the separate Appendix submitted with the Petition.

Numerous Montana clients of Petitioners, including between 150 and 200 retired persons, trusts, and pension plans, invested in the Homestead Bonds pursuant to the recommendation of Petitioners. The bonds payed interest until the Spring of 1991. After unsuccessful efforts to reorganize its affairs under the supervision of the Federal Office of Thrift Supervision, the federal regulators assumed control over Homestead Savings in October, 1994. The Homestead Bonds became valueless at that point.

Respondent Lynn, who invested funds from his I.R.A. account in the Homestead Bonds, filed on February 11, 1993 the Montana Action as a class action on behalf of all Montana Homestead Bond purchasers. In July, 1993, seventeen additional Montana Homestead Bond investors joined in the Montana Action as individual plaintiffs, consenting to their representation by Respondent on the class action claims, and also asserting individual damage claims based upon the Montana Consumer Protection Act (Montana Code Annotated Sections 30-14-101 *et seq.*).[2]

One month ***after*** the Montana Action was filed, a group of Homestead Bond investors from the State of Washington filed a similar class action suit ("Washington Action") in a Washington State Court in Seattle,

---

2. Montana is a Federal Rules state and allows liberal joinder of claims. The eighteen individual plaintiffs joined in the Montana Action for purpose of asserting any individual claims arising out of the Homestead Bond marketing scheme ***after*** the class action claims were resolved. The Montana Consumer Protection Act claim is such an individual claim.

Washington. While the two class actions both arose out of the marketing of Homestead Bonds, the claims raised in the two suits were ***not*** the same.

The Washington Action asserted claims under Washington law only, while the Montana Action asserted claims only under Montana law. Important for the present purposes, Washington law is much less favorable to defrauded securities purchasers than is Montana law. Washington does not allow punitive damages in any case, but Montana does allow punitive damages on common law fraud claims (Montana Code Annotated Sections 27-1-220 and 221). Noteworthy, there was significant evidence of fraudulent misconduct (such as alteration of client records to hide fraudulent activity and admitted misrepresentations of the market price of the bonds) in the Montana transactions which would support a punitive damage award. Further, the Washington Consumer Protection Act caps recoverable damages at $10,000 each plaintiff, while the Montana Consumer Protection Act has no cap and allows each plaintiff to recover three times her or his actual damages (Montana Code Annotated Section 30-14-133). (Appendix 202a-205a)

The Montana investors thus stood to gain far more in terms of monetary relief in the Montana Action (which was pending in the state of their residence) as their investments ran from $10,000 to $100,000 each. The liability case of the Montana investors under Montana law was also much stronger than that of the Washington

investors under Washington law.[3] For these reasons, joinder of the claims of the Montana investors and Washington investors in one class action suit presented a significant problem as to how any settlement proceeds would be allocated among the various claimants.[4]

The two class actions moved through pretrial proceedings for the first year, with the understanding that the claims of the Montana investors would be resolved in the Montana Action and the claims of the Washington investors would be resolved in the Washington Action. In the Spring of 1994, settlement negotiations were held in the Washington Action without notice to or involvement of Respondent Lynn or his counsel. Those negotiations resulted in a settlement of the Washington Action, but upon condition that the Washington class would be

---

3. It is undisputed that the Washington Court applied Washington law to determine the rights of the Montana investors. This in itself was a violation of this Court's mandate in ***Phillips Petroleum Co. v. Shutts***, 472 U.S. 797, 818-19 (1985) that the substantive law of the state of residence of the absent class members must normally be applied to determine their rights.

4. Class counsel in the Washington Action refused to recognize this problem because he was motivated to obtain an attorneys' fee of $3.6 million from the Washington Action. (Appendix 16a) If separate subclasses of state investors were created in the Washington Action, independent counsel would have to be appointed to represent the conflicting interests of these subclasses with regard to allocation of the settlement proceeds. See ***Hansberry v. Lee***, 311 U.S. 32 (1940). This would inevitably require allocation of any attorneys' fees awarded to the class counsel. This is but another ground upon which the absent Montana class members could ***subsequently*** attack the jurisdiction of the Washington Court over them before the Montana Court. See generally, Appendix 197a-201a.

expanded to include all Homestead Bond investors, including the Montana investors, who were already named as class members in the Montana Action.

After reaching this settlement, class counsel in the Washington Action approached Respondent Lynn, requesting that the Montana class members be included as part of the settlement of the Washington Action. Respondent Lynn agreed to do so if the claims of the Montana investors were treated separately, by creating subclasses of Montana and Washington investors, for purpose of allocating the settlement proceeds among the class. This would enable the Montana investors to argue that they were entitled to a larger pro rata portion of the Washington settlement fund. Washington class counsel refused to treat the two groups of investors separately, so non-judicial efforts to include the Montana investors in the Washington settlement failed. (Appendix 200a)

Washington class counsel then elected to seek court approval of the Washington settlement, including the Montana investors as part of the Washington Action. After learning of this, Respondent Lynn (1) filed a motion in the Montana Action seeking court approval to send notice to the Montana investors advising them of their right to join in the Montana Action as opposed to the Washington Action, and (2) filed an "opt out" election on behalf of all Montana investors in the Washington Action (Appendix 77a-78a)

The Montana Court ruled on Respondent Lynn's motion to notify the Montana investors on December 5,

1994, ten days ***before*** the Washington Court considered the fairness of the settlement of the Washington Action. At that time the Montana Court ruled that notice should be sent to all Montana investors of their option to join in the Montana Action or to join in the settlement of the Washington Action.[5] (Appendix 135a-137a) Rather than comply with the Montana Court's order requiring notice to be sent to the Montana investors, Petitioners moved to vacate that order and pressed forward to obtain a favorable ruling from the Washington court on the enforceability of that settlement against the Montana investors without any notice to them of their option to join in the Montana Action. (Appendix 52a)

Petitioners were ultimately successful in the "race to judgment." Before the Montana Court could rule on their motion to vacate the order requiring notice to the Montana investors, Petitioners convinced the Washington Court to include the Montana investors in the Washington settlement, without creating subclasses of state investors. (Appendix 24a) The Washington Court did not, however, give Petitioners everything they wanted.

The Washington Court first ruled that Respondent

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5. Importantly, the notice sent to the class members in the Washington Action did ***not*** advise the Montana investors of the pendency of the Montana Action or of their option to join in a similar lawsuit in their home state. Rather, the notice gave the impression that the only option available to the Montana investors was to join in the Washington settlement or file an individual suit on their own behalf. This Court has noted the inefficacy of the later option to small securities investors. See ***Phillips Petroleum Co v. Shutts***, 472 U.S. 797, 812-13 (1985).

Lynn did not have standing to "opt out" the Montana investors from the Washington settlement, and that he did not have standing to challenge the jurisdiction of the Washington Court on behalf of the absent Montana investors. (Appendix 25a) This ruling was essential to sustaining jurisdiction over the Montana investors because, as held by this Court in ***Phillips Petroleum Co. v. Shutts***, 472 U.S. 797, 812 (1985), Due Process requires that absent class members be allowed the opportunity to "opt out" of the class action. Because Respondent Lynn had filed "opt out" requests in the Washington Action on behalf of all absent *Montana* Homestead Bond investors (Appendix 77a-78a), if he had standing to file those "opt out" elections, the jurisdictional issue would have been conclusively resolved against Petitioners at that point.

Importantly, this "standing" ruling had the effect of eliminating the absent Montana investors from any further participation in the Washington Action, including the proceedings to determine the jurisdiction of the Washington Court over them and the proceedings to determine the fairness of the Washington settlement with respect to the Montana investors' claims. When the Washington Court ruled that Respondent Lynn did not have "standing" to represent the Montana investors in the Washington Action, it necessarily followed that Respondent Lynn did not have authority to take any further action in the Washington Action *on behalf of the*

absent Montana investors.[6]

The Washington Court next considered sua sponte whether it had jurisdiction to include the Montana investors in the Washington Action. (Appendix 25a, 140a-141a) It ruled that it did have jurisdiction over the Montana investors who expressly "opted in" the Washington Action, and that Respondent Lynn and the other Montana investors who had joined in the Montana Action had validly "opted out" of the Washington Action. Significantly, the Washington Court further ruled that the question of its jurisdiction over the remaining Montana investors who had done nothing--that is, had joined neither the Montana Action nor the Washington Action--would be determined by *another* court in which the settlement was sought to be enforced against them. (Appendix 141a) So the Washington Court merely ruled that it had personal jurisdiction over those Montana investors who had expressly elected to join in the Washington Action.

Petitioners' then pending motion to vacate the Montana Court order requiring notice to be sent to the Montana investors of their option to join in the Montana Action (as opposed to participating in the Washington settlement) was heard approximately three weeks after the Washington Court ruled that the Washington settlement

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6. Respondent Lynn himself, and the seventeen other individual Montana investors who had joined in the Montana Action, had already "opted out" of the Washington Action by valid "opt out" requests. (Appendix 18a) So it is undisputed that the claims of Respondent Lynn and these other individuals will be tried in the Montana Action, regardless of any ruling on the jurisdictional issues involved in this Petition.

was enforceable against the Montana investors who had not "opted out" of that case. In the order in question on the instant Petition, the Montana Court denied Petitioners' motion to vacate the order requiring notice to the Montana investors, certified the Montana Action as a class action, and again ordered that the Montana investors be notified of their option to join either in the Montana Action or in the Washington Action. (Appendix 6a-10a)

The Montana Court was obviously perturbed at the concerted efforts of Petitioners to prevent the Montana investors from making an intelligent choice as to which action they desired to join. The Montana Court, in denying Petitioners' motion to vacate the order requiring notice to the Montana investors, discussed the effect of the Washington Court's order binding the Montana investors to the Washington settlement as follows:

> "In Phillips Petroleum Co. v. Shutts, (1985) 472 U.S. 797, 811-12, the U.S. Supreme Court determined that due process requires several conditions to be satisfied before a distant state forum may subject non-resident class members to [a] judgment entered in a class action. A key provision is that the class members be notified of their rights. This Court has attempted to ensure that the Montana purchasers be apprised of the Montana action, thereby allowing them a choice. They have not been so notified, through no fault of Plaintiffs' counsel, and this in itself ***may be*** sufficient to invalidate the Washington Court's exercise of jurisdiction over the Montana bond

> purchasers. *Further, the Court has been witness to a deluge of documents, which have tended to obfuscate and delay rather than enlighten and expedite these proceedings.* For these reasons, the Court feels that notification is still a relevant and proper procedure." (Appendix 6a-7a) [Emphasis added]

So the Montana Court did not, as stated by Petitioners, rule that the Washington Court judgment was not binding on the Montana investors. Rather, it merely reaffirmed its prior order, made ***prior to*** the Washington Court's jurisdictional ruling, that the Montana investors should be first given notice of all options available to them before deciding in which action they desired to participate. This was important because, under the Washington settlement, those Montana investors who did nothing (neither "opted in" nor "opted out" of the Washington Action) would be barred from seeking any relief from Petitioners, yet they would receive *no settlement monies* from the Washington settlement. (Appendix 9a, 15a [see footnote 1]).

SUMMARY OF ARGUMENT

This reply will establish that the Petition should be denied for four reasons.

First, the Montana Courts have not made any "final" ruling on any jurisdictional or class certification issue. The Montana Courts have not refused to afford "full faith and credit" to the Washington judgment. They have not yet reached that issue. The Montana trial court has merely required that notice be sent to the Montana investors so that they can decide whether to remain as part of the Washington settlement, or to join in the Montana Action and then *subsequently* challenge the enforcement of the Washington judgment against them. The Montana Supreme Court declined to review that interlocutory order at this time because Petitioners had an adequate remedy by appeal from any final judgment entered in the case. This case is not yet ripe for review by certiorari.

Second, there is no issue in this case, as claimed by Petitioners, of two jurisdictional attacks by Respondent Lynn in violation of this Court's holding in ***Durfee v. Duke***, 375 U.S. 106 (1963). The Washington Court denied Respondent Lynn "standing" to represent the Montana investors in the Washington Action. So any action he took in that case could not bind or affect the absent Montana investors. Indeed, the Washington Court itself recognized that it was considering the jurisdictional issues ***sua sponte***, without participation by any of the absent Montana investors. The Washington Court even went so far as to hold that its jurisdiction over absent

Montana investors who had not expressly elected to participate in the Washington Action would have to be decided by another court on another day. Any subsequent attack by the absent Montana investors on the Washington judgment will be the *first time* that they have ever had their day in court on any jurisdictional issue.

Third, the issues presented by the Petition may well become moot as a result of subsequent proceedings in the Montana trial court. After the absent Montana investors receive notice of the Montana Action, they will be presented with two options. They may elect to remain as participants in the Washington settlement, in which event they will be excluded from participation in the Montana Action. That would moot any jurisdictional issue presented by the Petition. On the other hand, they might elect to participate in the Montana Action. If they do so, then proceedings will be held in the Montana Action to determine if they are bound by the release of claims in the Washington judgment. The Montana Court might decide that they are so bound, in which event the jurisdictional issue presented by the Petition would again be moot. Only if the Montana Court decides that the Montana investors electing to participate in the Montana Action are not bound by the Washington judgment will there exist the conflicting jurisdictional determinations which Petitioners bemoan. This is simply not the time to review jurisdictional issues which may or may not arise.

Fourth, Petitioners are not presented with the prospect of defending a duplicitous lawsuit as they claim. Regardless of this Court's disposition of the Petition, the

claims of the eighteen individual Montana investors who "opted out" of the Washington Action and joined in the Montana Action *will be tried* in the Montana Action. At worst, Petitioners will be faced with the prospect of additional damages being awarded in the Montana Action by reason of the inclusion of additional claimants in the case. Any jurisdictional issues still present after trial can be easily, and more appropriately, resolved on appeal from an adverse judgment.[7] On the other hand, if this Court rules upon the jurisdictional issues now, it will do so without the absent Montana investors ever having their day in court on those issues. At least for those Montana investors who received nothing from the Washington settlement, they would be denied the opportunity to participate in the benefits of the Montana Action. Yet they would receive nothing in exchange for the release of their claims by a distant state court in a lawsuit in which they were effectively unrepresented.[8]

For these reasons, the Petition should be denied and the Montana Action allowed to proceed to a final resolution of all issues.

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7. Indeed, if Respondents and the other individual plaintiffs are not successful on the merits of their claims against Petitioners, there will be no adverse judgment against Petitioners. This is yet another reason for establishing that the issues presented by the Petition may become moot and that they are not yet ripe for resolution by this Court.

8. Washington class counsel refused to allow the creation of subclasses by state investors in the Washington Action, and was thus in a position of representing class members with conflicting interests. This in itself rendered his representation of the Montana class members inadequate, requiring the Washington judgment to be set aside. See footnote 4, ***supra***.

ARGUMENT

A. The Montana Courts Did Not Rule Upon Any Jurisdictional Issues

Contrary to Petitioners' assertion (Petition 11-13), the Montana Courts did not rule upon any jurisdictional issues. The Order in question (Appendix 7a) specifically states that the failure of the plaintiffs in the Washington Action to notify the Montana investors of their option to join in the Montana Action ***may be*** sufficient to deprive the Washington Court of jurisdiction over them. It does not hold that the Washington Court did not have jurisdiction over the Montana investors.

Further, this Order goes on to merely require that the Montana investors be given notice of the Montana Action so that they are afforded the option of deciding in which case they desire to participate. (Appendix 7a) Only after the absent Montana class members make this choice could any jurisdictional issues conceivably be involved in this case. Until this choice is made, no jurisdictional issue ***could be*** decided by the Montana Courts.

Petitioners seek *certiorari* under the jurisdiction granted this Court by 28 U.S.C. § 1257, which provides, in part: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court ... " There is no "final" judgment here on *any* issues, let alone on the jurisdictional issues claimed by Petitioner.

In these proceedings, Petitioners seek review of the trial court's order certifying a class of Montana purchasers of Homestead bonds. Because an order certifying a class is not appealable of right in Montana [Rule 1(b)(2), Montana Rules of Appellate Civil Procedure] — as is true in the federal courts — Petitioners sought interlocutory review through a writ of supervisory control from the Montana Supreme Court. The Montana Supreme Court, however, did not address the merits of the class certification. Instead, the Montana Supreme Court held that Petitioners failed to show that they would be sufficiently prejudiced by having the Montana Supreme Court review the class certification order through the normal appellate process once a final judgment was entered in the trial court. (Appendix 2a)

Similarly, it would be inappropriate for this Court to grant *certiorari* to review the trial court's order granting class certification. As this Court has concluded that orders denying class certification in the federal system are not appealable as final orders, it is inappropriate to treat class certification issues pertaining to state litigation as final orders subject to Supreme Court review. See ***Coopers & Lybrand v. Livesay***, 437 U.S. 463 (1978).

The only case cited by Petitioners to support their claim of jurisdiction is ***Fisher v. District Court of the 16th Judicial District of Montana***, 424 U.S. 382 (1976). In ***Fisher***, the trial court concluded that it lacked jurisdiction over an adoption proceeding involving tribal members living on a reservation. The Montana Supreme Court considered the merits of that decision and reversed

the trial court, holding that Montana courts had jurisdiction over the adoption proceeding. 424 U.S. at 385. This Court held that the tribal court had exclusive jurisdiction over the adoption proceedings. 424 U.S. at 389. Because the highest court in the state had finally decided the federal issue, it was appropriate for this Court to accept *certiorari*. Moreover, ***Fisher*** involved the strong federal policy prohibitting state interference with the exclusive jurisdiction of tribal courts over tribal members. See ***Merrion v. Jicarilla Apache Tribe***, 455 U.S. 130, 102 S.Ct. 894, 918 (1982).

In the case at hand, however, the highest court of Montana has not spoken to the merits of the jurisdictional issues, but will do so later. Moreover, there are no strong federal policy considerations present here, such as protecting tribes from interference with their inherent sovereign authority. ***Fisher*** is not apposite to the instant situation.

This Court has determined that there are four limited circumstances under 28 U.S.C. § 1257 where this Court may review decisions by a state's highest court even though further proceedings remain in the state system. ***Cox Broadcasting Corp. v. Cohn***, 420 U.S. 469 (1975).

The first category are cases where there are further proceedings yet to occur, but where for one reason or another the determination of the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the

federal issue is deemed final. *Cox*, 420 U.S. at 479.

In the present case, a final decision on the claimed federal issue is neither conclusive nor is the outcome of further proceedings preordained. Class certification orders are always subject to change through final judgment. As one Court has noted:

> "[A]n order of a trial court which merely grants a request that an action proceed as a class action * * * * is not a final decision. ***Hellerstein v. Mr. Steak, Inc.***, 531 F.2d 470, 472 (10th Cir. 1976), *cert. denied*, 429 U.S. 823 (1976).

Further, the jurisdictional issues presented by the Petitioners have yet to be considered by either Montana Court. If, after the trial court has finally resolved all class issues, including whether the absent Montana class members are bound by the Washington judgment, the Montana Supreme Court concludes that the Petitioners are correct, then it can reverse or vacate the portion of the judgment awarding those investors relief. Thus, the outcome of further proceedings in the Montana courts is hardly "preordained."

The second circumstance under which interlocutory orders may be deemed final is when "the federal issue, finally decided by the highest court in the State, will survive and require a decision regardless of the outcome of future state court proceedings." *Cox*, 420 U.S. at 480. As discussed above, the federal issues have not been decided ***at all*** by either of the Montana courts, let alone "finally"

decided. And it is entirely possible that this jurisdictional issues will become moot as a result of further proceedings in the trial court. See pages 23-25, ***infra***. In short, the federal issues may disappear as a result of future proceedings in the Montana Courts, so this exception is inapplicable.

The third category includes cases where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. *Cox*, 420 U.S. at 481. Here, Petitioners still have the right to have the class certification issues — including any related federal jurisdictional issues — reviewed as a matter of right by the Montana Supreme Court. Indeed, the Montana trial court might yet rule favorably to Petitioners on the jurisdictional issues. Review of the jurisdictional issues on appeal from a final judgment is not only available here, but is the preferred course in light of the possibility that further orders may moot the need for ultimate review of these issues.

The final category permitting review of interlocutory rulings is for cases where the federal issue has been finally decided in the state courts, with further proceedings pending in which the parties seeking review here might prevail on the merits on non-federal grounds, but where reversal of the state court on the federal issue would be preclusive of any further litigation in the state court. In this circumstance, if a refusal immediately to review the state court decision might seriously erode federal policy, this Court has entertained and decided the

federal issue, which itself has been finally determined by the state courts for purposes of the state litigation. *Cox*, 420 U.S. at 482-83.

Once again, however, the Montana State Supreme Court has not decided the merits of the class certification issues. Additionally, neither the Montana trial court nor the Montana Supreme Court has decided the merits of any of the federal jurisdictional issues. The Montana Supreme Court has only decided that these issues should be reviewed on an appeal of right when the trial court enters its final judgment.

In *Cox*, this Court noted that the state court's judgment in that case was "plainly final on the federal issue and is not subject to further review in the state courts." 420 U.S. at 485. This Court also expressed concern that, if the petitioners in that case prevailed on different grounds at the trial court, a published decision of the Georgia State Supreme Court, holding that a civil action for publishing the name of a rape victim may proceed despite the First and Fourteenth Amendments to the Constitution, would remain unreviewed by this Court and could "leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt ... " 420 U.S. at 486.

In this case there are no similar concerns. Other than claiming that trying the case as a class action (instead of simply on behalf of 18 plaintiffs) will raise the complexity of the case, and suggesting that class actions

as a whole are frivolous (a questionable assertion at best), Petitioners have made no argument that there is a strong federal policy to be supported by grant of *certiorari* to deal with a small portion of this case. There are no published decisions implicating any federal policies, let alone those underlying the freedom of press concerns involved in ***Cox***. There is no final determination of any federal issue here as was true in ***Cox***.

The procedures followed by this Court in reaching its decision in ***Philips Petroleum Co. v. Shutts, supra,*** demonstrate the appropriate disposition of this case. In ***Shutts***, a class was certified in Kansas state court that included class members from all 50 states. The order certifying the class raised issues of the state court's jurisdiction over non-resident absent class members, and *mandamus* was sought from the Kansas Supreme Court to decertify the class, which was denied. ***Philips Petroleum v. Duckworth***, No. 82-54608 (Kan. June 28, 1982). Review was sought of the denial of the *mandamus* petition, and this Court denied *certiorari*. 459 U.S. 1103 (1983). See ***Shutts***, 472 U.S.at 801.

Following a trial on the merits, the Kansas Supreme Court decided the merits of the class certification issues, holding that the trial court had jurisdiction over non-resident absent class members, and that Kansas law should apply to all claims. 472 U.S. at 803. This Court held on appeal from this final judgment that, under the facts of that case, the Kansas court had jurisdiction over the absent class members, but reversed the holding that Kansas law was applicable to all of the claims. 472 U.S. at 823. This

Court should follow the procedure used in ***Shutts*** to review — if necessary — the class certification issues in this case which may remain once a final, appealable judgment has been entered.

B. The Absent Montana Class Members Are Not Attacking Jurisdiction of the Washington Court Twice

Petitioners contend that Respondent Lynn is directly attacking the jurisdiction of the Washington Court twice, in violation of this Court's ruling in ***Durfee v. Duke***, 375 U.S. 106 (1963). (Petition 13-18) Petitioners' argument ignores the very rulings made by the Washington Court under which they seek shelter.

The Washington Court specifically ruled that Respondent Lynn did not have "standing" to represent the absent Montana class members in the Washington Action. (Appendix 25a) This case does ***not*** involve the rights of Mr. Lynn to attack the Washington judgment. It is undisputed that he validly "opted out" of the Washington Action, and that the Washington Court did not have jurisdiction over his claims. (Appendix 18a) See ***Shutts***, 472 U.S. at 812. What is at issue is the jurisdiction of the Washington Court over the ***absent*** Montana class members, who never appeared in the Washington Action because of the Washington Court's decision denying standing to Mr. Lynn to represent them.

Durfee involved two attacks, direct and collateral, against the jurisdiction of the judgment rendering court,

both brought by the *identical* party. ***Durfee***, 375 U.S. at 110. That has not happened here. The absent Montana class members have never had their day in court to challenge the jurisdiction of the Washington Court over them. Indeed, the Washington Court itself recognized this and held that it would not consider whether it had jurisdiction over those absent Montana class members who had neither "opted in" nor "opted out" of the Washington Action, for "that argument will be for another day." (Appendix, 141a)

The essential underpining of ***Durfee***, and of the claims raised by Petitioners in this proceeding, is that the issue of the jurisdiction of the first forum have been "fully and fairly litigated by the parties and finally determined in the [forum] courts. . ." ***Durfee***, 375 U.S. at 116. There was no "full and fair litigation" of the Washington Court's jurisdiction over the absent Montana class members in that Court by the only parties adversely affected by that decision--*the absent Montana class members*. At most, the Washington Court (as it expressly recognized) considered the issue ***sua sponte***. And the only argument it received was from parties who were uniformly interested in sustaining that judgment, Petitioners to obtain releases of their claims and Washington class counsel to obtain a $3.6 million attorney's fee. See footnote 4, ***supra***.

The only "full faith and credit" principle applicable to this case is the cardinal rule noted by this Court in ***Shutts***, 472 U.S. at 805: "[A] judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no

res judicata effect as to that party." The absent party is always entitled to collaterally attack the judgment because he did not have the opportunity to "fully and fairly litigate" the jurisdiction of the distant forum over him in that forum. Because Respondent Lynn did not have standing to represent the absent Montana investors in the Washington action, his limited participation in that action can not bind them. There is no double jurisdictional attack here as was present in *Durfee*.[9]

C. The Jurisdictional Issues May Become Moot As A Result Of Further Proceedings In The State Courts

The Montana trial court merely ordered that notice be sent to the absent Montana class members of their right to participate in the Montana Action. (Appendix 6a-7a) After notice is sent, the absent Montana investors will have two options. Those who participated in the Washington settlement may elect to stay with that settlement, in which event they will "opt out" of the Montana Action. No jurisdictional issue would be presented for these class members as they would have

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9. The case of ***Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Ins. Guaranty Assn.***, 455 U.S. 691 (1982), cited by Petitioners (Petition 14, 15, 18), is also distinguishable on this basis. In ***Underwriters National***, the identical party sought to challenge the jurisdiction of the first forum, where it had directly participated in the proceedings before the first forum. The only additional issue present was its failure to raise certain jurisdictional arguments before the first forum. However, that was immaterial in light of the established rule of "res judicata" law that a judgment binds a party not only on issues actually litigated, but also on issues which *could have been* litigated. 455 U.S. at 708-10.

voluntarily waived their right to challenge the Washington judgment.

The other option would be to participate in the Montana Action. For this potential group of Montana investors, *subsequent* proceedings would be held in the Montana Action to determine if they are bound by the release of claims in the Washington judgment. These investors would then be able to raise all of their jurisdictional challenges to the Washington judgment. And importantly, Petitioners would be entitled to assert that they are bound by that judgment, because of "full faith and credit" principles or any other reasons available to them.

With respect to this latter group of investors, the Montana Courts might decide that they are bound by the releases contained in the Washington judgment. In this event the jurisdictional issue presented by the Petition would again disappear. Only if the Montana trial court rules that the Montana investors electing to participate in the Montana Action are not bound by the Washington judgment, ***and*** the Montana Supreme subsequently affirms that ruling on appeal, will there exist the conflicting jurisdictional determinations about which Petitioners complain.

As is evident from this scenario, several events may occur in the Montana Courts to moot the jurisdictional issues presented by the Petition. It is axiomatic that where further action in state proceedings could render any federal constitutional issues moot, the case is not ripe for

consideration by this Court. See ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. 172 (1985). Such is the situation here. No "full faith and credit" issues may arise depending on future proceedings in the Montana Courts.

D. Petitioners Will Not Suffer Any Prejudice As A Result Of Defending This Case Through Final Judgment

Petitioners final argument is that they will be prejudiced by being forced to defend a meritless class action. (Petition 21-27) This is a "red herring".

Whether or not this Court accepts jurisdiction of the Petition, and regardless of its ruling on the "full faith and credit" issues, the Montana Action will proceed forward to judgment on the claims of the eighteen individual Montana investors who "opted out" of the Washington Action and joined in the Montana Action. The same liability and damage issues will be tried in the Montana Action even if this Court were to rule that the Washington judgment bars the claims of all Montana investors excepting only the claims of these eighteen individual investors. The only additional burden interjected in the case by denying review at this time is that Petitioners could be exposed to larger damages, depending on the rulings of the Montana Courts on the binding effect of the Washington judgment on the absent Montana class members. This is not the type of prejudice which warrants immediate review by this Court.

On the other hand, review of the "full faith and credit" issues now will clearly prejudice the absent Montana investors who have never had their day in court. None of these investors has ever been provided the opportunity to argue that the Washington Court should not have exercised jurisdiction over their claims. The only argument attempted to be made on their behalves was not considered by the Washington Court because of its ruling that Respondent Lynn did not have "standing" to represent them. And the other parties to the Washington Action who were heard on this issue both had interests *directly conflicting* with those of the Montana investors. Petitioners desired to sustain jurisdiction over their claims in order to obtain binding releases of those claims. Further, Washington class counsel was blinded by the glare of a $3.6 million attorney's fee when he argued that the Washington Court had jurisdiction over their claims. See footnote 4, ***supra***.

The absent Montana investors should be allowed to express their own opinions as to the action in which they wish to resolve their claims. The Montana trial court has so ruled, and noted the tenacity with which Petitioners have attempted to deny them this choice. (Appendix 6a-7a) Allowing them this opportunity will also create an adequate factual record, through the efforts of truly adversarial parties, which will enable this Court (if necessary) to intelligently consider the merits of the jurisdictional issues. Review at this time will accomplish little, if anything, for Petitioners, but most assuredly will deny the absent Montana investors their day in court and burden this Court with an incomplete factual record.

CONCLUSION

The Order of the Montana Court does not finally adjudicate any jurisdictional issues, and is not ripe for review at this time, because the Montana Courts have not made any final jurisdictional rulings. Second, the Order does not constitute a second adjudication of jurisdictional issues as prohibitted by ***Durfee v. Duke***, but the first time the *absent class members* would even have the opportunity to attack the jurisdiction of the Washington Court. Third, the Order may become moot as a result of subsequent proceedings in the trial court, including elections by the absent Montana class members to remain as participants under the Washington settlement. Finally, there is no prejudice to Petitioners by delaying consideration of any jurisdictional issues until after final judgment as they will in any event have to defend through trial the claims of the eighteen individual plaintiffs in the Montana Action.

For these reasons, Respondent Lynn respectfully requests this Court to deny the Petition.

Respectfully submitted,

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January 30, 1996

APPENDIX R

FILED 12/28/94

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MONTANA FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUNTY

PAUL M. LYNN, on behalf of all similarly situated persons, Class Plaintiff, -vs- MURPHEY FAVRE, INC., et al, Defendants.	**DEPT. NO. 2 (HENSON)** Cause No. 77454
PAUL M. LYNN, an individual, MARGARET E. MANDELL and	**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO**

KIRK G. COMISKEY, et al,	) **VACATE ORDER**
	) **ALLOWING**
Individual	) **COMMUNICATION**
Plaintiffs,	) **WITH MONTANA**
-vs-	) **BOND PURCHASERS**
	)
MURPHEY FAVRE, INC., a corporation; et al,	) *[EXCERPT]*
Defendants.	)

Plaintiffs respectfully submit the following Memorandum in Opposition to Murphey Favre's Motion to Vacate Order Allowing Communication with Montana Bond Purchasers ("Motion to Vacate") filed on December 8, 1994:

* * * * * * * * * * * *

(4) There Was a Conflict of Interest Between the Montana Purchasers and Washington Purchasers, Thereby Rendering Their Representation by One Counsel a Denial of Due Process

Shutts held that a constitutional requirement to sustaining jurisdiction over nonresident plaintiffs in a class action is that "the named plaintiff at all times adequately represent the interests of the absent class members," citing Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115 (1940). In Hansberry, the U.S. Supreme Court voided, on collateral

attack, a class judgment which purported to bar the claims of property owners which had been adjudicated in an action where the members of the class had conflicting interests, but were represented by one party and counsel.[1] The Court held that "[b]ecause of the dual and potentially conflicting interests of those who were putative parties" to the class, their representation by one class representative denied them "due process" of law and rendered the resulting judgment void.

Subsequent cases have applied the Hansberry rule to void class actions settlements where "the members of [the] class have antagonistic or conflicting interests" with respect to the terms of the settlement, and are represented by one party. See, e.g., Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 697-98 (7th Cir. 1987) [class included all members of union pension plan; one group of class favored liberalization of pension benefit rules, which would expand the class, while members of the other group were pursuing claims for asset mismanagement; because every dollar allocated to the benefit liberalization group would reduce by one dollar that available for the asset mismanagement group, the court found "an obvious conflict of interest" between the two groups which rendered their representation by one party constitutionally defective]; Hooks v. General Finance Corporation, 652 F.2d 651, 652 (6th Cir. 1981) [class action for violation of

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1. The class in Hansberry included all property owners whose properties were subject to a restrictive covenant. Some of the class members wanted to enforce the covenant, while others did not. The Court held that these "dual and potentially conflicting interests" prohibited their representation by one party, thereby voiding the judgment as a violation of the Due Process Clause.

Truth in Lending Act; class representative sought full statutory award for himself ($1,000) even though class members would be restricted to pro rata share of recovery (which could be less than $1,000); because of potentially conflicting positions on allocation of damage or settlement award, class representative precluded from maintaining class action on behalf of group]; Albertson's, Inc. v. Amalgamated Sugar Co., 503 F.2d 459, 463-64 (10th Cir. 1974) [members of plaintiff class included competitors who might disparately benefit from a judgment declaring certain pricing methods of defendant to be unlawful; class certification denied; the court noted that "this requirement of adequate representation must be stringently applied because members of the class are bound unless they affirmatively exercise their option to be excluded, even though they may not be actually aware of the proceedings" (Emphasis added)]; Phillips v. Klassen, 502 F.2d 362, 366-67 (D.C.Cir. 1974) ["Class members whose interests are antagonistic in fact to, or even 'potentially conflicting' with, the interests of the ostensibly representative parties cannot be bound, consistent with the requirements of due process, to an adjudication in their name"; where class members may potentially have divergent views as to the conduct of the action, representation by one class member denies all due process of law; existence of "opt out" right does not cure problem].

In this case, the class in the Washington Class Action included both Washington and Montana bond purchasers. The Montana purchasers believed that their claims were more valuable because of the more liberal Montana damage laws and the stronger evidence of fraud in the Montana case. Accordingly, the Montana

purchasers felt that a larger pro rata share of the settlement proceeds should be attributed to their claims, as compared to that allocated to the claims of the Washington purchasers. Despite this obvious conflict of interest, only one party [Washington purchasers] and one attorney [who represented the Washington purchasers] represented the interests of all. Separate and independent attorneys should have represented each group in the settlement negotiations.

Further compounding this conflict was the ruling of the Washington Court that counsel for Mr. Lynn did not have standing to challenge the settlement on behalf of any of the Montana purchasers. The Washington Court permitted Washington counsel alone to argue the fairness of the settlement for Montana purchasers. (Youtz Affidavit, ¶ 11; Supp Hall Affidavit, Exhibit B, page 7) Not only did this attorney stand to gain significantly from approval of the settlement as structured (his firm was awarded $3,600,000 in attorneys' fees--Supp Hall Affidavit, Exh B, p. 5), but he presented a distorted and inaccurate presentation of Montana law to the Washington Court which ignored the rulings of this Court. (Snavely Affidavit, Exhibit G; see discussion, pp. 20-23, infra) Independent Montana counsel who could vigorously present the position of the Montana purchasers that they were entitled to a larger pro rata share of the settlement proceeds should have been appointed.

The inherent conflict of interest between the Montana and Washington purchasers with respect to the allocation of the Washington settlement proceeds rendered their representation by one party constitutionally defective. The interests of the Montana purchasers were not "adequately represented", thus voiding the Washington

judgment as a denial of "due process" for the Montana bond purchasers. Shutts, supra, 472 U.S. 812, 105 S.Ct. 2974.

(5) The Washington Court Considered the Benefits of the Settlement Under a Biased Presentation of Montana Law, Thereby Denying "Due Process" to the Montana Class Members

Shutts finally teaches that the Due Process clause requires the court in a class action to apply the substantive law of the state of residence of the nonresident plaintiffs in determining their rights. Shutts, 472 U.S. 821-22, 105 S.Ct. 2979. The forum court may only apply its own law to the claims of the nonresident plaintiffs if that state has "'significant contact[s] or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests', in order to ensure that the choice of [forum] law is not arbitrary or unfair." Id. The fact that the defendant owned property and conducted substantial business in the forum was not controlling. Shutts, 472 U.S. 819-20, 105 S.Ct. 2978. Rather, the expectation of the parties, based upon their residence and the situs where the subject contracts were made, was important. Shutts, 472 U.S. 822, 105 S.Ct. 2980. In Shutts, this required the law of the plaintiffs' residence to be applied.

In this case, Washington has no contacts whatsoever with the sales of Homestead Bonds to Montana purchasers. All Montana transactions were consummated in Montana, with Montana residents,

through the Defendants' offices and agents located in Montana. The only "Washington" connection for the transactions at issue in this case is the fact that the Defendants' home offices are located there. Because the Defendants chose to reap the benefits of Montana business in Montana, they must have their liabilities resulting from that business adjudicated under Montana law.

The Washington Court was presented with a biased and inaccurate presentation of Montana law by Washington attorneys who sought to gain $3,600,000 in fees from a ruling that Montana law was not more favorable than Washington law. Attached as Exhibit "G" to the Snavely Affidavit is a copy of the memorandum submitted to the Washington Court which contained the argument of Washington counsel as to the relative merits of Washington and Montana law. The following is a comparison of Montana law as represented by Washington counsel [indicated by "WA1", "WA2", etc][2] with the actual status of Montana law [indicated by "MT1", "MT2", etc] as previously determined by this Court or otherwise cited:

WA1. Washington "fraud" statute of limitation is 3 years, which is more liberal than Montana 2 year statute. Montana statute likely ran on Montana purchasers because of SEC filing in 1991 and drop in price by 1991. Wash.Brief, pp. 2-3.

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2. These items appeared in a table in original brief. Because table would not fit within margin requirements of this brief, table has been edited to appear as below. Substance of information is unchanged from original brief filed in state court.

MT1. Montana "fraud" statute of limitation did not commence until Homestead was declared insolvent (Nov. 1992) because Montana purchasers were not damaged until then. SEC Report not sufficient to provoke "discovery" by Montana purchasers. 2/16/94 Order, pp. 5-6.

WA2. Montana court ruled that "significant issues exist as to whether the Montana court has personal jurisdiction over Washington Mutual as a defendant." Wash.Brief, p. 4, ll. 2-4.

MT2. Plaintiff's Complaint does not clearly state a claim for relief against Washington Mutual, so Motion for More Definite Statement granted. 2/16/94 Order, pp. 10-11. Plaintiffs cured defect by filing Second Amended Complaint on 4/4/94. See Second Amended Complaint, ¶¶ 4, 7, 8, 28, 29, 42. This Court has not ruled upon, or made any indication of its position on, Washington Mutual's motion to dismiss for lack of personal jurisdiction.

WA3. Treble damage claims under Montana Consumer Protection Act are likely to be time barred because of applicable two year statute of limitations [MCA §27-2-211(1)(c)]. Further, Montana CPA claims can not be asserted in a class action, which would likely preclude their assertion by Montana purchasers. Wash. Brief, pp. 4-5. This argument was made to counter the admitted fact that the Washington CPA allows a maximum recovery of $10,000, while the Montana CPA has no such limit, allowing recovery of three times actual damages. (See Entriken v. Motor Coach Federal Credit Union, 256 Mont.

85, 93-94, 845 P.2d 93, 98 (1992))

MT3. Absent a specific limitation period in statute creating remedy, general rule is that longest pertinent limitation period is applied. Because statutory claim based on securities transaction is essentially contractual in nature, 8 year contract limitation period applies to CPA statutory claim based on securities transaction. Two year limit in MCA §27-2-211(1)(c) is not applicable. Thiel v. Taurus Drilling, Ltd. 1980-II, 218 Mont. 201, 212-13, 710 P.2d 33, 40 (1985). Montana CPA has no specific limitation period, thus longer contract limit (8 years) is applicable. Further, Montana CPA claims may be joined in class action suit and damages awarded as part of individual relief. State ex rel Boyne USA, Inc. v. District Court, 228 Mont. 314, 316, 742 P.2d 464, 465 (1987).

WA4. Although Washington does not allow recovery of punitive damages in any circumstance, and Montana allows punitive damages in common law "fraud" cases, punitive damages are not recoverable in Montana in a class action. Wash. Brief, pp. 5-6. Further, the evidence in the Washington case did not reveal sufficiently egregious conduct to warrant an award of punitive damages. Wash. Brief, p. 8.

MT4. Punitive damages are recoverable in a class action. State ex rel Boyne USA, Inc. v. District Court, 228 Mont. 314, 316, 742 P.2d 464, 465 (1987); Cecil v. Allied Stores Corp., 162 Mont. 491, 493, 513 P.2d 704, 705. There is significant evidence of fraudulent activity in the Montana transactions, including the regular fraudulent

alteration of client account records and account agreements to "cover up" the misrepresentations made during the initial bond sales. Damaging admissions were made by the Defendants in the Montana case. (Snavely Affidavit, ¶ 7)

WA5. Montana law requires "scienter"--an intent by the defendant to deceive the securities purchaser--in order to establish a securities fraud claim. Montana law also requires "loss causation"--not only that plaintiffs relied on the misrepresentations but also that the defendant's conduct affected the value of the security--in order to establish a securities fraud claim. Wash.Brief, pp. 9-10.

MT5. "Scienter" is not required to establish a securities fraud claim. A negligent misrepresentation is sufficient, even if the defendant believed his statements to be true. Brown v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 197 Mont. 1, 11-12, 640 P.2d 453, 458-59 (1982). Montana law only requires "proximate causation" in a securities fraud case, which is established where Plaintiff's reliance on the misrepresentation and his resulting loss of investment was reasonably foreseeable by the Defendants. Kitchen Krafters, Inc. v. Eastside Bank of Montana, 242 Mont. 155, 169-70, 789 P.2d P.2d 567, 575 (1990); 2/16/94 Order, p. 7; Second Amended Complaint, ¶ 30.

The foregoing comparison establishes that Plaintiffs' counsel in the Washington Class Action presented a totally distorted and inaccurate picture of Montana law to the Washington Court. The effect of his

argument was to apply Washington law, or some hybrid mix of Montana and Washington law, to the Court's consideration of the fairness of the Washington settlement. Shutts teaches that application of any law other than that of Montana to consideration of the fairness of the Washington settlement for Montana purchasers is prohibited. For this additional reason, the Washington judgment violates the "due process" rights of the Montana purchasers. That judgment may thus not be recognized for any purpose by this Court.

Supreme Court, U.S.
FILED
FEB 15 1996
CLERK

No. 95-995

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MURPHEY FAVRE, INC.,
WASHINGTON MUTUAL SAVINGS BANK,
GREGORY ONDRAK, JAMES ROYAN and
DOUGLAS SPRINGER,

Petitioners,

v.

PAUL M. LYNN, on behalf of himself and
all similarly situated persons, and THE DISTRICT
COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF MONTANA, IN AND FOR THE
COUNTY OF MISSOULA, THE HONORABLE
JOHN S. HENSON, PRESIDING JUDGE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF MONTANA

REPLY BRIEF FOR PETITIONER

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I. INTRODUCTION

In accordance with Supreme Court Rule 15.6, Petitioners respectfully submit this reply brief to address certain assertions in Respondent's Brief in Opposition ("Respondent's Brief").

Respondent Lynn ("Respondent") makes irrelevant legal arguments which do not deal with the issues actually raised by the Petition and relies on factual assertions that either miss the point or should be disregarded because they have no support in the record before this Court. Despite Respondent's misdirection, this Court should grant *certiorari* to prevent the further disregard of the strong federal policies favoring the finality of negotiated class action settlements and the constitutional dictates of the Full Faith and Credit clause.

II. FACTUAL BACKGROUND

To clarify the record, Petitioners respond below to some of the incorrect and unsupported factual assertions made in Respondent's Brief. Petitioners also request that the Court disregard any factual assertions made by Respondent which are not supported by the record before the Court.

A. Montana Bond Purchasers Were at All Times Members of the Class in the Washington Action.

Respondent contends that the class in the Washington Action was "expanded" to include Montana bond purchasers on the eve of settlement. Respondent's Brief at 5. Respondent cites no factual support for this assertion, nor could he do so, because the assertion is false. The class definition in the Washington Action included *all* purchasers of Homestead bonds, regardless of their state of residence, from the inception of that case through its

settlement. *See* Appendix 152a-53a, 161a, 167a, 171-72a.[1]

Respondent also mischaracterizes the scope of the Washington court's Final Judgment, arguing that it was limited to "those Montana investors who had expressly elected to join in the Washington Action." Respondent's Brief at 8. The Washington court expressly considered "a comparison of the potentially applicable provisions of Montana law and Washington law" and concluded that the settlement was "fair, reasonable and adequate to *all members* of the Class, including, without limitation, Montana Homestead Bond purchasers." Appendix 13a (emphasis added); *see also* Appendix 25a. Likewise, the Washington court concluded it had personal jurisdiction over "all Class Members," drawing no distinction between those who had or had not filed a claim. Appendix 14a, 152a-53a ("Class Members" means all persons in the Class "but excludes any Person who submits a valid and Timely request for exclusion"). Thus, the Final Judgment dismissed the claims of all "Class Members" – i.e., all bond purchasers except the named plaintiffs in the Montana Action, who were the only "opt outs."

B. No Member of the Washington Class Has Challenged the Washington Court's Jurisdiction.

Respondent claims to have filed an opt-out request for *all* Montana bond purchasers. Respondent's Brief at 5. But Respondent must admit that the Washington court ruled he lacked standing to do so because he presented no evidence of authority to exercise the right to opt out

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[1] Respondent's claim that the Washington and Montana actions "were *not* the same" (Respondent's Brief at 3) is also less than candid. The original complaint in the Montana Action was never served on Petitioners, and the subsequent versions of the Montana complaint were amended to include virtually identical claims as those made in the Washington Action.

on behalf of anyone other than himself. Appendix 25a. No *other* Montana bond purchaser has yet questioned the Washington court's jurisdictional ruling. In contrast, Respondent has challenged the Washington court's jurisdiction before *both* the Washington and the Montana courts. Appendix 64a-66a.

III. LEGAL ARGUMENT

A. The Montana Supreme Court's Dismissal Order Is an Immediately Reviewable Final Judgment.

Respondent spends much of his argument attempting to show that the September 26, 1995 order entered by the Montana Supreme Court (the "Dismissal Order") is not a final judgment ripe for review by this Court. Respondent's Brief at 14-21. Respondent is wrong for at least two reasons.

First, Respondent is wrong because directly applicable precedent from this Court holds that an order which terminates original proceedings seeking a Writ of Supervisory Control before the Montana Supreme Court constitutes a final judgment. *Fisher v. District Court of 16th Judicial Dist.*, 424 U.S. 382, 385 (1976). In *Fisher,* this Court set forth three compelling reasons why *certiorari* is available to review an order terminating interlocutory writ proceedings before the Montana Supreme Court. *First,* a Writ of Supervisory Control is available only in original proceedings before the Montana Supreme Court. *Id.* at 385 n.7. *Second,* the order terminating those writ proceedings is not equivalent to an appeal from the underlying case. *Id. Third,* "[a] judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final, *even if further proceedings are to be had in the lower court.*" *Id.* (emphasis

added). Whether an order grants or denies the requested writ has nothing to do with whether it finally terminates the proceedings before the appellate court. *Fisher* is dispositive authority establishing that the Dismissal Order may be reviewed now.

Second, Respondent is wrong because his main authority for the argument that this case is not appropriate for review is completely inapplicable here. *See* Respondent's Brief at 16-19 (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)). Like *Fisher*, *Cox* arose under the predecessor to the current statute governing this Court's jurisdiction. But *Fisher* arose under this Court's certiorari jurisdiction, and that provision (former 28 U.S.C. §1257(3) (1970)) was carried forward almost entirely into the current statute. *Fisher*, 424 U.S. at 385 n.7; *see* 28 U.S.C. §1257(a) (1988). *Cox* came before this Court under the provision concerning this Court's *appellate* jurisdiction over state court proceedings (former 28 U.S.C. §1257(2) (1970)). *Cox*, 420 U.S. at 476. The section interpreted by *Cox* was eliminated in the 1988 amendments. *See* 28 U.S.C. §1257 (1988). Therefore, *Cox* is completely irrelevant to this case and carries no precedential value whatsoever.[2]

Under *Fisher*, there is no question that the Dismissal Order is a final judgment which may be reviewed by this Court now. Thus, the question before the Court is whether the Full Faith and Credit issues presented in this

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[2] Like the citation of *Cox*, Respondent's reliance on the first denial of *certiorari* in *Shutts* is misplaced. *See Phillips Petroleum Co. v. Duckworth*, 459 U.S. 1103 (1983) (denying *certiorari* without opinion). Nothing in the Court's memorandum opinion or its later decision suggests that the order of the Kansas Supreme Court denying the requested writ of mandamus was not a *final* judgment. *Id.*; *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 801 (1985). The decisions merely recite, without explanation, the fact that *certiorari* was denied.

case are sufficiently important to merit immediate review.[3]

B. Respondent Cannot Act as a Class Representative Because He Is Bound by the Washington Court's Jurisdictional Rulings.

Respondent attempts to modify the questions presented in the Petition to focus on the rights of absent class members to collaterally attack a foreign court's jurisdictional ruling. *See, e.g.*, Respondent's Brief at (*i*). Respondent's new questions are hypothetical and irrelevant because no Montana bond purchaser who remained in the Washington settlement class has ever challenged the Washington court's jurisdiction to enter the Final Judgment. This case involves the ability of *Respondent*, who voluntarily litigated and lost the jurisdiction issue before the Washington court, to relitigate that issue in the Montana courts.

Respondent cannot dispute his actual participation in the Washington Action. Respondent's motion to dismiss the claims of *all* Montana bond purchasers prompted the Washington court's ruling that it had jurisdiction over the absent class members. Appendix 20a-21a. Respondent admits the single fact that demonstrates why he cannot serve as a class representative: "The Washington Court ruled that the Washington settlement was enforceable against the Montana investors who had not 'opted out' of that case." Respondent's Brief at 8-9; *see also*

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[3] Respondent also improperly relies on *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). *Livesay* establishes that a federal district court's order decertifying a class may not be an appropriate subject for interlocutory review under 28 U.S.C. §1291. *Id.* at 465. But this case involves a final order from the highest court of a state on an issue concerning the lower court's jurisdiction to hear the class action case *at all*. *Fisher* makes the Dismissal Order the proper subject of a *certiorari* petition; *Livesay* is simply inapplicable.

Appendix 13a-15a, 152a-53a. Once the Washington court entered its Final Judgment, the Full Faith and Credit clause required the Montana courts to defer to the Washington court's rejection of Respondent's jurisdictional objections. *See Durfee v. Duke*, 375 U.S. 106, 111 (1963) (citing U.S. Const. art. IV, §1).

Respondent's own brief explains why *Durfee* is dispositive of the Full Faith and Credit issues:

> *Durfee* involved two attacks, direct and collateral, against the jurisdiction of the judgment rendering court, both brought by the identical party. *Durfee*, 375 U.S. at 110.

Respondent's Brief at 21-22. So does this case. Respondent litigated and lost his jurisdictional challenges in Washington. Rather than appealing the Washington court's rulings, Respondent then went forum shopping and *relitigated* those very same issues by seeking class certification in Montana. *Durfee* and the doctrine of jurisdictional finality prohibit Respondent from undertaking this transparent attempt to evade the outcome of his motion before the Washington court.

Respondent argues that the doctrine of jurisdictional finality explicated in *Durfee* does not apply to him because the Washington court ruled that he lacked standing to act on behalf of Montana bond purchasers. Respondent's Brief at 22-23. Respondent misses the point again. By availing himself of the opportunity to contest jurisdiction before the Washington court, Respondent consented to entry of a determination that would be binding on him. *Durfee*, 375 U.S. at 111. Any result other than this would eviscerate the Full Faith and Credit clause, leaving it to be largely flouted in the context of multistate class action litigation.

Respondent's focus upon the rights of "absent class members" is a red herring. The Montana courts allowed Respondent to act as a class representative when he was precluded from challenging the Washington court's jurisdiction to enter the Final Judgment. In doing so, the Montana courts failed to afford Full Faith and Credit to the Washington court's rejection of Respondent's jurisdiction objections. Intervention by this Court is appropriate to correct this disregard of the Full Faith and Credit clause.

C. Petitioners' Constitutional Claims Are Ripe for Consideration.

Respondent argues that review of the Dismissal Order now is premature for essentially two reasons. First, Respondent claims that the Montana courts have not yet ruled on the jurisdictional issue. Respondent's Brief at 19. Second, Respondent asserts that *certiorari* should not be granted because subsequent proceedings in the trial court may render the issue moot. Respondent's Brief at 24. These arguments mischaracterize the proceedings below and improperly minimize the prejudice to Petitioners as a result of the rulings below.

Respondent's argument that the Montana courts have not actually addressed the Washington court's jurisdiction over the Montana bond purchasers is inconsistent with the impact of the Certification Order and the Dismissal Order. The Montana trial court resuscitated the claims extinguished by the Washington court's Final Judgment and gave the Montana bond purchasers a new option — i.e., rescission of the Washington releases in favor of participation in the Montana Action. Appendix 7a. The Dismissal Order kept those claims alive by allowing the Montana Action to proceed to judgment as a class action. Appendix 1a-2a. In each case, Petitioners raised and

argued the Full Faith and Credit implications of the Final Judgment on the Montana courts' rulings. *See, e.g.*, Appendix 28a-42a, 43a-91a. In each case the Montana courts disregarded those arguments. Because the Petition presents jurisdictional issues, *certiorari* is proper even though the case on the merits will proceed below. *Fisher*, 424 U.S. at 385; *see also Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 31 (1916) (state supreme court's order dismissing writ of prohibition was a final judgment; the "fact that it does not decide the merits . . . is immaterial . . . [because] [i]t is not devoted to that point, but only the preliminary question of the jurisdiction of the court in which that suit is brought.").

Fisher is also a sufficient answer to Respondent's contention that the jurisdiction issue may be rendered moot by later proceedings in the Montana *trial court*. The constitutional violation complained of here by Petitioners was complete upon entry of the Dismissal Order by the Montana Supreme Court. The proceedings before the Montana Supreme Court in which the Dismissal Order was entered are over, and no further proceedings will occur. The possibility that further *trial court* proceedings may occur is simply irrelevant. *Fisher*, 424 U.S. at 385.[4]

D. Immediate Review Will Further Strong Public Policies.

Perhaps the most surprising assertion made by Respondent is that "Petitioners have made no argument

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[4] Even if the trial court proceedings were relevant, Respondent presents nothing other than speculation to support his mootness argument. *See, e.g.*, Respondent's Brief at 24 ("[S]everal events may occur . . . ."). The Montana trial court has already rejected the Full Faith and Credit arguments by entering the Certification Order. Appendix 3a-10a. This issue, which is separate and distinct from the merits of the named plaintiffs' claims, is ripe for review now.

that there is a strong federal policy to be supported by grant [sic] of *certiorari* . . . ." Respondent's Brief at 20. Petitioners have brought this matter before the Court because it involves a public policy embedded in the system of federalism set forth in the U.S. Constitution. The requirement that the courts of one state respect and give preclusive effect to judgments entered in the courts of another state is "central to our system of jurisprudence." *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 703-04 (1982). This policy of jurisdictional finality is critically important because it eliminates the "uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue." *Id.* This policy is at the heart of the Petition. *See, e.g.*, Petition at 13-21.

Likewise, the Montana courts' disregard of the Washington court's Final Judgment violates the strong federal public policy in favor of enforcing negotiated settlements in class actions. *Air Line Stewards & Stewardesses Ass'n v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1166-67 (7th Cir. 1980), *aff'd sub nom. Zipes v. Trans World Airlines*, 455 U.S. 385 (1982). Both of these policies seek to conserve the scarce resources of the judiciary and the parties by allowing one fair opportunity to resolve a dispute, but precluding the proverbial "second bite at the apple." Every single member of the Washington settlement class was given the opportunity to request exclusion. Appendix 12a-13a, 183a. By failing to do so, the Montana bond purchasers elected to accepted the benefits of the Washington settlement and to forego further pursuit of their claims. Not one person has expressed a desire to revisit that decision, except Respondent, who has already had his day in court. Further litigation by Respondent on this question is unnecessary and is *precisely* the outcome prohibited by the public policies this Court must enforce.

IV. CONCLUSION

Respondent's Brief attempts to gloss over two critical facts: (1) Respondent Lynn has already litigated and lost the issue of whether the Washington court had jurisdiction over absent class members, and (2) the Washington court entered a Final Judgment dismissing the claims of all purchasers of Homestead Bonds who did not expressly opt out of the Washington Action. These two facts preclude Respondent from seeking class certification in the Montana Action. By correcting the Montana courts' failure to afford preclusive effect to the Washington court's Final Judgment, this Court will affirm the vitality of the Full Faith and Credit clause and reinforce the finality of negotiated settlements in multistate class actions.

Petitioners therefore respectfully request *certiorari* be granted in this matter.

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February 15, 1996